

REPORTS
OF THE
PUBLIC SERVICE COMMISSION
OF
THE STATE OF MISSOURI

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May 23, 2007 – December 31, 2007

Morris Woodruff
Reporter of Opinions

JEFFERSON CITY, MISSOURI
(2012)

PREFACE

This volume of the *Reports of the Public Service Commission of the State of Missouri* contains selected Reports and Orders issued by this Commission during the period beginning May 23, 2007 through December 31, 2007. It is published pursuant to the provisions of Section 386.170, et seq., Revised Statutes of Missouri, 2000, as amended.

The syllabi or headnotes appended to the Reports and Orders are not a part of the findings and conclusions of the Commission, but are prepared for the purpose of facilitating reference to the opinions. In preparing the various syllabi for a particular case an effort has been made to include therein every point taken by the Commission essential to the decision.

The *Digest of Reports* found at the end of this volume has been prepared to assist in the finding of cases. Each of the syllabi found at the beginning of the cases has been catalogued under specific topics which in turn have been classified under more general topics. Case citations, including page numbers, follow each syllabi contained in the Digest.

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RELAY MISSOURI

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In the Matter of the Review of the Deaf Relay Service and Equipment Distribution Fund Surcharge.

Case No. TO-2007-0306

Decided June 7, 2007

Rates §81. The Commission ordered that the Relay Missouri surcharge was to be continued at the current rate of \$0.13 and that the amount that could be retained by the local exchange companies would also be continued at the rate of one percent or \$30 whichever is greater.

Rates §110. The Commission ordered that the Relay Missouri surcharge was to be continued at the current rate of \$0.13 and that the amount that could be retained by the local exchange companies would also be continued at the rate of one percent or \$30 whichever is greater.

Telecommunications §1. The Commission ordered that the Relay Missouri surcharge was to be continued at the current rate of \$0.13 and that the amount that could be retained by the local exchange companies would also be continued at the rate of one percent or \$30 whichever is greater.

ORDER ADOPTING RELAY MISSOURI FUND REVIEW AND ESTABLISHING FUND SURCHARGE

On February 13, 2007, the Staff of the Missouri Public Service Commission filed a Motion to Open Case to Review Staff Recommendation. Attached to that Motion was a summary of the Staff's detailed review of the funding of the Deaf Relay Service and Equipment Distribution Fund ("Relay Missouri Fund"). Staff's review was conducted pursuant to 209.259 RSMo 2000. That review is attached hereto as Attachment A.

The Staff reviewed the level of the surcharges, the fund balance, the retention amount that compensates the local telephone companies that collect and remit the surcharges, and the expenditures for Relay Missouri. Staff reviewed the traditional deaf relay service, CapTel service, and distribution of equipment enhancing the use of telecommunications technology by people with disabilities. The Staff analyzed the level of actual fund expenditures and projected fund expenditures based on several scenarios, including the continuation of current trends without other change. Those scenarios, using surcharges from ten to thirteen cents, show a range of fund balances as of September 2008 of (\$4,810,852.73) to \$3,858,081.21. The Commission finds the Staff's review was properly conducted, sufficient and will adopt it.

The Staff notes that while the fund balance is slowly growing, certain contingencies may occur to cause expenditures to drastically increase. The Commission finds that the possibility of under-funding, which may disrupt use of the Missouri Relay program, is more detrimental to the public interest than an increasingly large fund balance. At the time of the next review, if none of the scenarios that will cause an increase in expenditures has come to pass, the surcharge can be decreased to spend down the balance. Therefore the Commission finds that continuation of the surcharge at \$0.13 is appropriate.

Finally, the Staff contacted the companies that collect and remit the surcharge. With the exception of one company that requested an increase, the companies existing stated the retention amount sufficiently compensates companies for collecting and remitting the surcharge. The Commission finds that the current retention amount of one percent or \$30, whichever is greater, is sufficient and shall be maintained unchanged.

IT IS ORDERED THAT:

1. The Staff review filed with the Commission on February 13, 2007, is adopted.
2. The Relay Missouri surcharge shall be continued at the current rate of \$0.13.
3. The amount retained by local exchange companies shall be continued at one percent or \$30, whichever is greater.
4. This order shall become effective on June 17, 2007.
5. This case may be closed on June 18, 2007.

Davis, Chm., Murray, Gaw, Clayton
and Appling, CC., concur.

Dale, Chief Regulatory Law Judge

In the Matter of Aquila, Inc., to Implement a General Rate Increase for Retail Electric Service Provided to Customers in Its Aquila Networks-MPS and Aquila Networks-L&P Missouri Service Areas.*

Case No. ER-2007-0004

Decided June 14, 2007

Electric § 1. The Commission ordered that the proposed tariff sheets submitted by Aquila, Inc., d/b/a Aquila Networks – MPS and Aquila Networks – L&P, submitted on May 25, 2007, be

*This case was appealed to the Missouri Court of Appeals (WD70798) and affirmed. See 326 S.W. 3d 20 (Mo. App. W.D. 2010)

rejected. The basis for rejection was noncompliance with Commission Rule 4 CSR 240-20.090(6) which requires the effective period for any fuel adjustment clause to be no more than four years. In specific the rejected sheets are Sheet No. 124, 125, 126, and 127.

**ORDER REJECTING TARIFF, GRANTING CLARIFICATION,
DIRECTING FILING AND CORRECTING ORDER NUNC PRO TUNC**

Syllabus: This order rejects the four tariff sheets filed by Aquila, Inc., d/b/a Aquila Networks – MPS and Aquila Networks – L&P, on May 25, 2007, grants Aquila's May 29, 2007, Motion for Clarification, authorizes Aquila to file revised tariff sheets in compliance with the Report and Order as clarified herein, and corrects the Report and Order nunc pro tunc.

Background

On May 17, 2007, the Commission issued its Report and Order in this case. On May 21, 2007, the Commission issued an Order Clarifying Report and Order clarifying that hedging costs were to flow through the fuel adjustment clause as provided for under the terms of the Stipulation and Agreement as to Certain Issues approved by Commission order on April 12, 2007. On May 25, 2007, the Commission issued an Order Granting Expedited Treatment, Approving Certain Tariff Sheets and Rejecting Certain Tariff Sheets (First Tariff Order), which among other things, rejected Aquila's Original Sheet Nos. 124, 125 and 126, which were designed to implement Aquila's authorized fuel adjustment clause, as not being in compliance with the Report and Order. That order further authorized Aquila to file substitute sheets in compliance with the Report and Order.

On May 25, 2007, Aquila filed four (4) tariff sheets (the Tariff Sheets) designed to comply with the Report and Order and First Tariff Order. The Tariff Sheets bear an effective date of June 25, 2007. On May 29, 2007, Staff filed its recommendation that the Commission reject the Tariff Sheets contending they did not comply with the Report and Order. First, Staff objects to the Tariff Sheets based upon the inclusion of SO₂ emission allowance costs in the costs that will flow through the fuel adjustment clause. Staff contends that, because SO₂ emission allowance costs do not vary directly with Aquila's kWh sales of electricity, they are not "variable fuel and purchased power costs." Next, Staff objects to the provisions in Aquila's proposed fuel adjustment clause that call for the calculation of interest on deferred electric energy costs on a monthly basis, contending the calculation of interest on a monthly basis is not authorized by the Report and Order. Staff contends the interest on deferred electric energy costs should only be computed and applied in connection with the true-up audit, and with the "refund" of imprudently incurred costs in the case

of the prudence review as provided for under Section 386.266.4 RSMo¹ and Commission Rule 4 CSR 240-20.090.

Also on May 29, AG Processing, Inc. (AGP), and the Sedalia Industrial Energy User's Association (SIEUA) filed a supplemental objection to the tariff sheets filed by Aquila on May 24, 2007. Although those tariff sheets were subsequently withdrawn and replaced with revised sheets on May 25, 2007, SIEAU and AGP argue one point that is germane to a Commission decision regarding the Tariff Sheets. Specifically, SIEAU and AGP argue that neither the Report and Order, nor the applicable Commission Rules, permit interest to be recovered in Aquila's fuel adjustment clause. They further contend that Section 386.266 RSMo only contemplates interest calculations on refunds after true-up, but not overages.

On May 29, 2007, Aquila filed its response to Staff's recommendation to reject the Tariff Sheets and a Motion for Clarification of Report and Order. Aquila argues the Tariff Sheets comply with the Report and Order and seeks clarification from the Commission regarding the objections raised by Staff.

SO₂ Emission Allowance Costs

At page 44 of the Report and Order, the Commission stated "Aquila will only be allowed to flow variable fuel and purchased power costs, including variable transportation costs, through its fuel adjustment clause." Although Staff supported inclusion of SO₂ emission allowance costs in the costs that should flow through a fuel adjustment clause,² Staff interprets the language set out above as excluding these costs from recovery or refund through the fuel adjustment clause. Specifically, Staff contends that, because SO₂ emission allowance costs do not vary directly with Aquila's kWh sales of electricity, they are not "variable fuel and purchased power costs."

The Commission herein clarifies that the language in question was intended to include SO₂ emission allowance costs. SO₂ emission allowance costs are variable fuel related costs in that they vary based upon the volume of coal used, as well as, the market prices of the allowances themselves.³ The Commission did not specifically list SO₂ emission allowance costs as costs that should flow through the fuel adjustment clause, because no party, including Staff, argued for their exclusion.

¹ All references to Section 386.266 RSMo are to the 2006 Cumulative Supplement.

² Ex. 208 HC, Featherstone Surrebuttal, page 13, lines 1-2.

³ Ex. 2, Block Direct, page 4, lines 5-9; and Ex. 208 HC, Featherstone Surrebuttal, page 13, lines 1-2.

clause, because no party, including Staff, argued for their exclusion. Further, other costs that do not vary directly with kWh sales, such as transportation costs, flow-through the fuel adjustment clause.

Interest on Deferred Fuel and Energy Costs

Staff suggests that Aquila's fuel adjustment tariff does not comply with the Report and Order in that it provides for computation of interest on monthly over/under collection balances. SIEUA and AGP suggest, in addition, that the fuel adjustment clause tariff must specify an interest rate, absent which Aquila, the Commission and customers will not be able to ascertain the rates to be charged.

In the Report and Order the Commission did not specifically authorize Aquila to accrue interest on over- or under-collections of fuel and purchased power costs because the authority and method to accrue interest on such amounts is expressly set out in Section 386.266.4(2) RSMo and Commission Rule 4 CSR 240-20.090(5). Specifically, Section 386.266.4(2) states:

The commission shall have the power to approve, modify, or reject adjustment mechanisms submitted under subsections 1 to 3 of this section . . . , provided that it finds that the adjustment mechanism set forth in the schedules: (1) . . . ; (2) Includes provisions for an annual true-up which shall accurately and appropriately remedy any over- or under-collections, **including interest** at the utility's short-term borrowing rate, through subsequent rate adjustments or refunds; (emphasis added)

Under this section, the Commission is not authorized to approve a fuel adjustment clause that does not provide for the recovery or refund of over- or under-collections of fuel costs and purchased power costs, including interest at the utility's short-term borrowing rate.

Similarly, Commission Rule 4 CSR 240-20.090(5), requires an electric utility filing for a rate adjustment mechanism;

. . . to include in its tariff schedules and application, if filed in addition to tariff schedules, provision for true-ups on at least an annual basis which shall accurately and appropriately remedy any over-collection or under-collection through subsequent rate adjustments or refunds.

- (A) The subsequent true-up rate adjustments or refunds shall include interest at the electric utility's short-term borrowing rate. (emphasis added)

These provisions are dispositive of the issue. The statute provides for interest to be computed and paid at and after the annual true-up performed in accordance with a Commission approved fuel adjustment clause.

As set out in the Conclusions of Law on page 48 of the Report and Order, Under 4 CSR 240-20.090(4)(A) "An electric utility with a fuel adjustment clause must file at least one adjustment to its fuel adjustment clause in each true-up year coinciding with the true-up of its fuel adjustment clause." Section 396.266 RSMo, 4 CSR 3.161(1)(G) and 4 CSR 240-20.090(1)(I) define the true-up period at the conclusion of which interest on over- or under-collection of fuel and purchased power costs is to be calculated as an annual period.

Although the fuel adjustment clause authorized by the Commission in the Report and Order allows Aquila to make two "adjustments" per year, nothing in the applicable statute, rule or the Commission's Report and Order authorize the true-up of the fuel adjustment clause or application of interest, except during the "annual true-up" performed at the conclusion of the "true-up year." Further, Commission Rule 4 CSR 240-3.161(7), which sets out the filing requirements for interim adjustments under a fuel adjustment clause, does not even require the utility to submit information on its cost of short-term debt. In contrast, Commission Rule 4 CSR 240-3.161(8), which sets out the filing requirements for an annual true-up application, does require information on the utility's short-term borrowing costs.

Therefore, under its fuel adjustment clause Aquila shall calculate interest monthly on its cumulated over/under recovery of fuel costs, and collect that interest in the rate calculated during the annual true-up. The Commission intends that the fuel adjustment process track the process used in the purchased gas adjustment/actual cost adjustment process for local gas distribution companies.

Further, in order to implement an additional, interim rate under the fuel adjustment clause, Aquila must compute, file and separately identify on bills the specific rate charged customers. The statute and rules provide for review of such riders prior to their implementation, and for their true-up review prior to becoming final, permanent rate elements. SIEAU and AGP's contention in this regard are without merit.

The Commission has reviewed the Tariff Sheets, Staff's Recommendation, SIEUA and AGP's objections and Aquila's responses. In addition to the issues addressed above, the Commission finds the Tariff Sheets are not in compliance with Commission Rule 4 CSR 240-20.090(6)

which requires the effective period for any fuel adjustment clause to be no more than four years. Based upon its review of Tariff Sheets, Recommendation, objections and responses the Commission concludes that the Tariff Sheets are not consistent with the Report and Order, Section 386.266 RSMo, or Commission Rule 4 CSR 240-20.090, and should be rejected.

Aquila will be directed to file revised tariff sheets 124 through 127 that are in compliance with the Report and Order, as clarified herein, Section 386.266 RSMo (2006 Cum. Supp.), and Commission Rule 4 CSR 240-20.090.

The Commission has identified a factual error in the Report and Order that it will correct nunc pro tunc. Legal Counsel for AARP is identified in the Report and Order as John W. Coffman. The attorney's middle initial is in fact B. The identified factual error will be corrected nunc pro tunc.

The Commission will direct its Staff to review the Tariff Sheets and determine if they are in Compliance with the Report and Order as clarified. The Commission will suspend the Tariff Sheets for seven days to allow Staff sufficient time to complete its review and recommendation, and allow the Commission time to further analyze the Tariff Sheets and the Staff recommendation.

IT IS ORDERED THAT:

1. Aquila's Motion for Clarification filed on May 29, 2007, is granted, as addressed in the body of this order.

2. The proposed electric service tariff sheets submitted by Aquila, Inc., d/b/a Aquila Networks – MPS and Aquila Networks – L&P, on May 25, 2007, are rejected. The specific sheets rejected are:

P.S.C. MO. No. 1, Electric Rates

Original Sheet No. 124

Original Sheet No. 125

Original Sheet No. 126

Original Sheet No. 127

3. Aquila, Inc., d/b/a Aquila Networks – MPS and Aquila Networks L&P shall file revised tariff sheets 124 through 127 in compliance with the Report and Order as clarified herein.

4. The following item in the Commission's May 17, 2007 Report and Order is corrected nunc pro tunc: In the Appearances section of page 1, the name of AARP's attorney is John B. Coffman, not John W. Coffman.

SPECTRA COMMUNICATIONS GROUP, LLC
D/B/A CENTURYTEL

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5. This order shall become effective on June 14, 2007.

Davis, Chm., Murray, and Appling,
CC., concur.
Gaw, C., dissents, with separate
dissenting opinion to follow.
Clayton, C., dissents.

Voss, Regulatory Law Judge

Note: At time of publication, no dissent has been issued.

**In the Matter of Spectra Communications Group, LLC d/b/a
CenturyTel's Request for Competitive Classification Pursuant to
Section 392.245.5, RSMo. Tariff No. JI-2007-0840**

Case No. IO-2007-0439

Decided June 14, 2007

Telecommunications § 40. The Commission ordered that Spectra Communications Group, LLC d/b/a CenturyTel's residential services, other than exchange services be classified as competitive. The Commission determined that there was undisputed evidence that there was at least, one non-affiliated wireless carrier and at least one non-affiliated wireline carrier, which provided basic local telecommunications service in the Brunswick, Cameron, Golden, City, Greenfield Lawson and Sarcoxie exchanges.

ORDER GRANTING COMPETITIVE CLASSIFICATION

Syllabus: In this Order, the Missouri Public Service Commission grants Spectra Communications Group, LLC d/b/a CenturyTel's request, pursuant to Section 392.245.5, RSMo Cum. Supp. 2005, for competitive classification of the residential services Spectra offers in its Brunswick, Cameron, Golden City, Greenfield, Lawson, and Sarcoxie exchanges, other than exchange access services. In addition, the Commission approves the substitute tariff sheets Spectra filed to implement that classification.

Procedural History

On May 17, 2007,¹ Spectra Communications Group, LLC d/b/a CenturyTel ("Spectra") filed its verified Application for Competitive

¹ Unless otherwise specified, all dates refer to the year 2007.

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Classification pursuant to Section 392.245.5, RSMo Cum. Supp. 2005. In its application, Spectra requested that the Commission classify the business services it offers in its Mount Vernon exchange, other than exchange access services, as competitive. Spectra also requested that the Commission classify the residential services Spectra offers in its Brunswick, Cameron, Golden City, Greenfield, Lawson, Mountain Grove, and Sarcoxie exchanges, other than exchange access services, as competitive. Concurrent with the filing of its application, Spectra filed proposed tariff sheets which reflected the requested competitive classifications and had an effective date of June 16.²

On May 22, the Commission entered its Order Directing Notice, Establishing Procedural Schedule, and Reserving Hearing Date, in which the Commission provided notice of Spectra's application to all certificated competitive local exchange carriers and incumbent local exchange carriers in Missouri, as well as to the General Assembly and the news media, that any party wishing to intervene in the proceeding must file an application no later than May 29. This order also established a full procedural schedule and reserved Thursday, June 7, for an evidentiary hearing on Spectra's application should the Commission receive an objection to the application by any party. According to the procedural schedule, the parties' pre-filed testimony was due June 4; pretrial briefs, witness lists, and proposed findings of fact were due June 6; and the hearing itself was to be conducted on March 7 beginning at 9:00 a.m. in Room 310. There were no requests for intervention.

On June 1, after discussions with Staff and the Office of the Public Counsel ("OPC"), Spectra amended its application to withdraw its original request for competitive classification of the business services in its Mount Vernon exchange. On the same day, OPC filed a pleading asking the Commission to require strict compliance with the statutory requirements relating to the remainder of Spectra's application, which at that time concerned the residential services Spectra offers in its Brunswick, Cameron, Golden City, Greenfield, Lawson, Mountain Grove, and Sarcoxie exchanges, other than exchange access services. OPC's pleading further indicated that although OPC would not stipulate that those exchanges exhibit sufficient competition to justify competitive classification, it was *not*

² Substitute sheets with the same effective date were filed on June 7. The tariff sheets do not adjust Spectra's rates but simply reflect the requested competitive classifications in the relevant exchanges.

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requesting an evidentiary hearing and had no objection to the Commission deciding the case on the basis of the existing record before it.

Also on June 1, Staff filed a verified pleading recommending that the Commission approve Spectra's amended application, with the exception of its request for competitive classification of the residential services Spectra offers in its Mountain Grove exchange, other than exchange access services. This was because, after conducting its investigation, Staff was unable to independently confirm that there are at least two qualifying carriers serving that exchange who are not affiliated with Spectra but provide basic local phone service to residential customers in that exchange. On June 4, after more discussions with Staff and OPC, Spectra further amended its application to withdraw its original request for competitive classification of the residential services in its Mountain Grove exchange, thereby bringing its application in line with Staff's recommendation. Staff also submitted the verified pre-filed testimony of Staff witness Michael S. Scheperle on June 4.

Later on the afternoon of June 4, the Regulatory Law Judge assigned to this case conducted a conference with attorneys from Spectra, Staff, and OPC, all of whom indicated that they did not plan to request an evidentiary hearing. All of the parties also agreed to the submission into evidence of the pre-filed testimony from Mr. Scheperle without the necessity of him taking the stand or being cross-examined, and that the Commission should decide this matter on the basis of Spectra's verified second amended application, Staff's favorable recommendation, and the pre-filed testimony, which would further explain the basis for Staff's recommendation. The parties were also amenable to conducting an on-the-record conference with the Commissioners on the afternoon of June 7 if the Commission so desired, but at an agenda meeting on June 5, the Commission decided that no such conference was necessary.³

On June 7, Spectra withdrew the tariff sheets it had previously submitted, which had been assigned Tariff Tracking No. JI-2007-0840, and replaced them with a revised tariff reflecting the various amendments it had made to its original application. Finally, on June 8, Staff filed its verified

³ This is consistent with past Commission practice in adjudicating uncontested applications for competitive classification under Section 392.245.5, RSMo Cum. Supp. 2005 where there has been no request for a hearing by any party. See, e.g., Order Granting Competitive Classification, *In the Matter of Sprint Missouri Inc.'s Application for Competitive Classification Under Section 392.245.5 RSMo (2005)*, Case No. TO-2006-0375 (Apr. 20, 2006) (application granted based on verified application and verified Staff Recommendation without evidentiary hearing or on-the-record conference with the Commissioners where there were no objections to the application by any party).

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recommendation in favor of approving the substitute tariff sheets filed by Spectra the previous day, with an effective date of June 16.

Overview

Spectra is a large incumbent local exchange carrier ("ILEC") that is subject to price cap regulation under Section 392.245, RSMo Cum. Supp. 2005. Under price cap regulation, maximum allowable rates are established and other restrictions are placed on the ability of the regulated company to raise its rates. The statute that created price cap regulation includes provisions that allow a price cap regulated company to escape regulation when competition develops in the exchanges served by that company. If a carrier obtains competitive status in an exchange, it will gain greater pricing flexibility and will be able to raise, or lower, the applicable tariffed rate for its services, except exchange access service, by giving ten days notice to the Commission and affected customers. An ILEC with competitive status in an exchange will have essentially the same pricing flexibility in that exchange as a competitive local exchange carrier ("CLEC").

Upon proper request, the Commission must classify the ILEC's services as competitive in any exchange in which at least two other non-affiliated carriers are providing basic local telecommunications services within an exchange.⁴ The statute provides that one commercial mobile radio service provider can be counted as an entity providing basic local telecommunications services.⁵ The other entity that can be counted as providing basic local telecommunications services is one that provides "local voice service in whole or in part over telecommunications facilities or other facilities in which it or one of its affiliates have an ownership interest."⁶ Therefore, an exchange would be competitive in which two or more facilities-based wireline carriers are providing services to customers, or in which one facilities-based wireline carrier and one wireless carrier are providing services to customers.

Spectra's application indicates that it faces competition from at least one wireless carrier and one facilities-based wireline carrier for residential services in its Brunswick, Cameron, Golden City, Greenfield, Lawson, and Sarcoxie exchanges, other than exchange access services.

Findings of Fact

The Missouri Public Service Commission, having considered all of the verified pleadings and pre-filed testimony (including attachments), which are admitted into evidence, makes the following findings of fact. The

⁴ Section 392.245.5(6), RSMo Cum. Supp. 2005.

⁵ Section 392.245.5(1), RSMo Cum. Supp. 2005.

⁶ Section 392.245.5(2), RSMo Cum. Supp. 2005.

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positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Spectra is a "local exchange telecommunications company" and a "public utility," and is authorized to provide "telecommunications service" within the state of Missouri as each of those phrases is defined in Section 386.020, RSMo 2000.⁷ Spectra is a large ILEC subject to price cap regulation.⁸

In its second amended application, Spectra requested that the Commission classify its residential services, except for exchange access service, in its Brunswick, Cameron, Golden City, Greenfield, Lawson, and Sarcoxie exchanges as competitive, and filed substitute tariff sheets reflecting those classifications.⁹ In support of this request, Spectra's verified application included a chart and other evidence indicating that at least one non-affiliated wireless carrier is currently providing service in all the relevant exchanges.¹⁰ The application also included evidence that there are also wireline competitors in each of those exchanges that are facilities-based CLECs or cable operators who are currently providing local phone service via their own facilities to residential customers geographically located within the exchanges.¹¹

Staff also provided its verified recommendation in which it discussed its own investigation into the companies providing wireless and wireline service to the relevant exchanges. According to Staff's recommendation, the exchanges for which Spectra requests competitive status all have at least one non-affiliated wireless provider and at least one non-affiliated facilities-based wireline carrier providing local voice service to residential customers with addresses within the exchanges.¹² Furthermore, Staff advised that "the competing carriers have local numbers available for use by residential customers in those exchanges."¹³

In addition to these verified pleadings, the record also contains the pre-filed direct testimony of Michael S. Scheperle, a regulatory economist

⁷ Application at 1-2.

⁸ *Id.* at 2.

⁹ Second Amended Application at 1-2; Staff Recommendation for Approval of Tariff Sheets at

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¹⁰ Application at 4; Exhibits A, B, C, D, E, F, and I to Application.

¹¹ Application at 4-6; Exhibits A, B, C, D, E, F, and I to Application.

¹² Staff Recommendation at 1-2.

¹³ Staff Recommendation at 2.

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for the Telecommunications Department Staff of the Commission who began his employment with the Commission in June 2000.¹⁴ Attached to his testimony is a variety of documentary materials upon which he relied in reaching his conclusions, including, but not limited to: affidavits and letters from representatives of various wireless and wireline providers¹⁵ and a chart summarizing the evidence he reviewed.¹⁶

Mr. Scheperle testified that at least one wireless carrier unaffiliated with Spectra is providing local voice service to two or more residential customers within the Brunswick, Cameron, Golden City, Greenfield, Lawson, and Sarcoxie exchanges.¹⁷ He also testified that an unaffiliated wireline carrier is providing local voice service to two or more residential customers located within those exchanges using facilities it owns in whole or in part.¹⁸ Therefore, Mr. Scheperle testified, Staff's recommendation was that Spectra's application for competitive classification of the residential services provided in its Brunswick, Cameron, Golden City, Greenfield, Lawson, and Sarcoxie exchanges, other than exchange access services, be approved by the Commission.¹⁹

The Commission finds that the facts as submitted in the verified second amended application, the verified Staff Recommendation, and the pre-filed testimony and related attached materials are reliable and support the grant of competitive classification in the Brunswick, Cameron, Golden City, Greenfield, Lawson, and Sarcoxie exchanges. The Commission finds that in each of those exchanges, facilities-based local voice service is being provided to at least two residential customers by an unaffiliated wireline carrier. In addition, the Commission finds that there is at least one non-affiliated commercial mobile radio services carrier providing service to residential customers in Spectra's Brunswick, Cameron, Golden City, Greenfield, Lawson, and Sarcoxie exchanges. The Commission further

¹⁴ Scheperle testimony at 1-2.

¹⁵ Schedules 3-1 through 3-6, 4HC, 5-4 through 5-5, and 5-6HC to Scheperle testimony.

¹⁶ Schedule 2 to Scheperle testimony.

¹⁷ Scheperle testimony at 5-6. For the Brunswick exchange the carriers are Cingular and US Cellular; for the Cameron exchange they are T-Mobile, Cingular, Sprint PCS, and Alltel; for the Golden City and Greenfield exchanges it is Cingular; for the Lawson exchange the carriers are T-Mobile (ported numbers only), Cingular, and Sprint PCS; and for the Sarcoxie exchange the carriers are Cingular, Sprint PCS, and US Cellular. *Id.*; Schedule 2 to Scheperle testimony. The Commission further notes there was also evidence that these wireless providers permit local dialing to and from numbers within the relevant exchanges.

¹⁸ Scheperle testimony at 7-8. That carrier is Mediacom. *Id.*; Schedule 2 to Scheperle testimony.

¹⁹ Scheperle testimony at 9.

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finds that the competing carriers have local numbers available for use by residential customers in those exchanges.

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law:

The Commission has jurisdiction over this matter pursuant to Section 392.245.5(6), RSMo Cum. Supp. 2005, which provides as follows:

Upon request of an incumbent local exchange telecommunications company seeking competitive classification of business service or residential service, or both, the commission shall, within thirty days of the request, determine whether the requisite number of entities are providing basic local telecommunications service to business or residential customers, or both, in an exchange and if so, shall approve tariffs designating all such business or residential services other than exchange access, as competitive within such exchange.

Spectra is an incumbent local exchange telecommunications company and has requested competitive classification of its residential services in the Brunswick, Cameron, Golden City, Greenfield, Lawson, and Sarcoxie exchanges.

Section 392.245.5, RSMo Cum. Supp. 2005, provides as follows:

Each telecommunications service offered to business customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to business customers within the exchange. Each telecommunications service offered to residential customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to residential customers within the exchange.

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For the purpose of determining whether competitive status is appropriate in an exchange, one commercial mobile service provider can be considered an entity providing "basic local telecommunications services."²⁰ The statute also requires the Commission to consider as a "basic local telecommunications service provider" any entity providing "local voice service in whole or in part over facilities in which it or one of its affiliates has an ownership interest."²¹

Section 392.245.5(3), RSMo Cum. Supp. 2005, defines "local voice service" as meaning "[r]egardless of the technology utilized . . . two-way voice service capable of receiving calls from a provider of basic local telecommunications services as defined by subdivision (4) of section 386.020, RSMo 2000."

The statute defines "telecommunications facilities" to include, among other items, "lines, conduits, ducts, poles, wires, cables, receivers, transmitters, instruments, machines, appliances and all devices, real estate, easements, apparatus, property and routes used, operated, controlled or owned by any telecommunications company to facilitate the provision of telecommunications service."²²

Spectra is asserting that its residential services in the Brunswick, Cameron, Golden City, Greenfield, Lawson, and Sarcoxie exchanges should be classified as competitive. As the party asserting the positive of a proposition, Spectra has the burden of proving that proposition.²³

Because the opportunity for an evidentiary hearing was provided and no proper party requested such a hearing, the Commission may rely on the verified pleadings filed by Spectra and Staff, as well as the pre-filed testimony Staff submitted, in making its decision in this case.²⁴

Decision

The undisputed evidence establishes that for residential customers in the Brunswick, Cameron, Golden City, Greenfield, Lawson, and Sarcoxie exchanges there is at least one non-affiliated entity providing local voice service in whole or in part over facilities in which it, or one of its affiliates, has an ownership interest so as to constitute the provision of basic local telecommunications within the meaning of Section 392.245.5(3), RSMo Cum. Supp. 2005. Furthermore, the undisputed evidence establishes that

²⁰ Section 392.245.5(1), RSMo Cum. Supp. 2005.

²¹ Section 392.245.5(2), RSMo Cum. Supp. 2005.

²² Section 386.020(52), RSMo 2000.

²³ *Dycus v. Cross*, 869 S.W.2d 745, 749 (Mo. banc 1994).

²⁴ See, e.g., *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. W.D. 1989); n.3 *supra*.

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for residential customers in the Brunswick, Cameron, Golden City, Greenfield, Lawson, and Sarcoxie exchanges there is at least one non-affiliated wireless carrier providing basic local telecommunications service within the meaning of Section 392.245.5(1), RSMo Cum. Supp. 2005. Therefore, the Commission concludes that Spectra's application for competitive classification of its residential services, other than exchange access services, in the Brunswick, Cameron, Golden City, Greenfield, Lawson, and Sarcoxie exchanges should be granted.

As required by the statute, Spectra submitted tariff changes to implement the competitive classification of its services. Those tariff sheets, which Staff recommended be approved, carry an effective date of June 16. Since the submitted tariff corresponds with the Commission's decision, that tariff will be approved.

IT IS ORDERED THAT:

1. Spectra Communications Group, LLC d/b/a CenturyTel's residential services, other than exchange access service, are classified as competitive in the Brunswick, Cameron, Golden City, Greenfield, Lawson, and Sarcoxie exchanges.

2. Spectra Communications Group, LLC d/b/a CenturyTel's proposed tariff revisions (Tariff No. JI-2007-0840) are approved to become effective for service on or after June 16, 2007. The tariff approved is:

P.S.C. Mo. No. 1 Section 4

2nd Revised Sheet 1, Replacing 1st Revised Sheet 1

Original Sheet 17.2

Original Sheet 17.3

Original Sheet 17.4

Original Sheet 17.5

Original Sheet 17.6

Original Sheet 17.7

Original Sheet 17.8

3. This order shall become effective on June 16, 2007.

Davis, Chm., Murray, Gaw,
Clayton and Appling, CC., concur.

Lane, Regulatory Law Judge

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In the Matter of CenturyTel of Missouri, LLC's Request for Competitive Classification Pursuant to Section 392.245.5, RSMo.

Case No. IO-2007-0440

Decided: June 14, 2007

TELECOMMUNICATIONS § 40. The Commission ordered that CenturyTel of Missouri, LLC's business services, other than exchange services, be classified as competitive. The Commission determined that there was undisputed evidence that there was at least, one non-affiliated wireless carrier and at least one non-affiliated entity providing local voice service carrier, which provided basic local telecommunications service in the Branson, Ozark and Troy exchanges related to business services.

TELECOMMUNICATIONS § 40. The Commission ordered CenturyTel of Missouri, LLC's residential services, other than exchange services, be classified as competitive. The Commission determined that there was undisputed evidence that there was at least, one non-affiliated wireless carrier and at least one non-affiliated entity providing local voice service carrier, which provided basic local telecommunications service in Bourbon, Cabool, Cassville, Cuba, Forsyth, Kimberling City, and Mansfield exchanges.

ORDER GRANTING COMPETITIVE CLASSIFICATION

Issue Date: June 14, 2007

Effective Date: June 16, 2007

Syllabus: In this Order, the Missouri Public Service Commission grants CenturyTel of Missouri, LLC's request, pursuant to Section 392.245.5, RSMo Cum. Supp. 2005, for competitive classification of the business services CenturyTel offers in its Branson, Ozark, and Troy exchanges, other than exchange access services. The Commission also grants CenturyTel's request that the Commission classify the residential services CenturyTel offers in its Bourbon, Cabool, Cassville, Cuba, Forsyth, Kimberling City, and Mansfield exchanges, other than exchange access services, as competitive. In addition, the Commission approves the substitute tariff sheets CenturyTel filed to implement those classifications.

Procedural History

On May 17, 2007,¹ CenturyTel of Missouri, LLC ("CenturyTel") filed its verified Application for Competitive Classification pursuant to Section 392.245.5, RSMo Cum. Supp. 2005. In its application, CenturyTel requested that the Commission classify the business services it offers in its Branson, Crane, Marshfield, Ozark, and Troy exchanges, other than

¹ Unless otherwise specified, all dates refer to the year 2007.

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exchange access services, as competitive. CenturyTel also requested that the Commission classify the residential services CenturyTel offers in its Bourbon, Branson, Cabool, Cassville, Cuba, Forsyth, Kimberling City, Mansfield, and Troy exchanges, other than exchange access services, as competitive. Concurrent with the filing of its application, CenturyTel filed proposed tariff sheets which reflected the requested competitive classifications and had an effective date of June 16.²

On May 22, the Commission entered its Order Directing Notice, Establishing Procedural Schedule, and Reserving Hearing Date, in which the Commission provided notice of CenturyTel's application to all certificated competitive local exchange carriers and incumbent local exchange carriers in Missouri, as well as to the General Assembly and the news media, that any party wishing to intervene in the proceeding must file an application no later than May 29. This order also established a full procedural schedule and reserved Friday, June 8, for an evidentiary hearing on CenturyTel's application should the Commission receive an objection to the application by any party. According to the procedural schedule, the parties' pre-filed testimony was due June 4; pretrial briefs, witness lists, and proposed findings of fact were due June 6; and the hearing itself was to be conducted on June 8 beginning at 9:00 a.m. in Room 310. There were no requests for intervention.

On June 1, after discussions with Staff and the Office of the Public Counsel ("OPC"), CenturyTel amended its application to withdraw its original requests for competitive classification of the business services in its Crane and Marshfield exchanges, and for competitive classification of the residential services in its Branson exchange. On the same day, OPC filed a pleading asking the Commission to require strict compliance with the statutory requirements relating to the remainder of CenturyTel's application, which at that time concerned the business services CenturyTel offers in its Branson, Ozark, and Troy exchanges, as well as the residential services CenturyTel offers in its Bourbon, Cabool, Cassville, Cuba, Forsyth, Kimberling City, Mansfield, and Troy exchanges, other than exchange access services. OPC's pleading further indicated that although OPC would not stipulate that those exchanges exhibit sufficient competition to justify competitive classification, it was *not* requesting an evidentiary

² Substitute sheets with the same effective date were filed on June 7. The tariff sheets do not adjust CenturyTel's rates but simply reflect the requested competitive classifications in the relevant exchanges.

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hearing and had no objection to the Commission deciding the case on the basis of the existing record before it.

Also on June 1, Staff filed a verified pleading recommending that the Commission approve CenturyTel's amended application, with the exception of its request for competitive classification of the residential services CenturyTel offers in its Troy exchange, other than exchange access services. This was because, after conducting its investigation, Staff was unable to independently confirm that there are at least two qualifying carriers serving that exchange who are not affiliated with CenturyTel but provide basic local phone service to residential customers in that exchange. On June 4, after more discussions with Staff and OPC, CenturyTel further amended its application to withdraw its original request for competitive classification of the residential services in its Troy exchange, thereby bringing its application in line with Staff's recommendation. Staff also submitted the verified pre-filed testimony of Staff witness Michael S. Scheperle on June 4.

Later on the afternoon of June 4, the Regulatory Law Judge assigned to this case conducted a conference with attorneys from CenturyTel, Staff, and OPC, all of whom indicated that they did not plan to request an evidentiary hearing. All of the parties also agreed to the submission into evidence of the pre-filed testimony from Mr. Scheperle without the necessity of him taking the stand or being cross-examined, and that the Commission should decide this matter on the basis of CenturyTel's verified second amended application, Staff's favorable recommendation, and the pre-filed testimony, which would further explain the basis for Staff's recommendation. The parties were also amenable to conducting an on-the-record conference with the Commissioners on the afternoon of June 7 if the Commission so desired, but at an agenda meeting on June 5, the Commission decided that no such conference was necessary.³

On June 7, CenturyTel withdrew the tariff sheets it had previously submitted, which had been assigned Tariff Tracking No. JI-2007-0839, and replaced them with a revised tariff reflecting the various amendments it had made to its original application. Finally, on June 8, Staff filed its verified

³ This is consistent with past Commission practice in adjudicating uncontested applications for competitive classification under Section 392.245.5, RSMo Cum. Supp. 2005 where there has been no request for a hearing by any party. See, e.g., Order Granting Competitive Classification, *In the Matter of Sprint Missouri Inc.'s Application for Competitive Classification Under Section 392.245.5 RSMo (2005)*, Case No. TO-2006-0375 (Apr. 20, 2006) (application granted based on verified application and verified Staff Recommendation without evidentiary hearing or on-the-record conference with the Commissioners where there were no objections to the application by any party).

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recommendation in favor of approving the substitute tariff sheets filed by CenturyTel the previous day, with an effective date of June 16.

Overview

CenturyTel is a large incumbent local exchange carrier ("ILEC") that is subject to price cap regulation under Section 392.245, RSMo Cum. Supp. 2005. Under price cap regulation, maximum allowable rates are established and other restrictions are placed on the ability of the regulated company to raise its rates. The statute that created price cap regulation includes provisions that allow a price cap regulated company to escape regulation when competition develops in the exchanges served by that company. If a carrier obtains competitive status in an exchange, it will gain greater pricing flexibility and will be able to raise, or lower, the applicable tariffed rate for its services, except exchange access service, by giving ten days notice to the Commission and affected customers. An ILEC with competitive status in an exchange will have essentially the same pricing flexibility in that exchange as a competitive local exchange carrier ("CLEC").

Upon proper request, the Commission must classify the ILEC's services as competitive in any exchange in which at least two other non-affiliated carriers are providing basic local telecommunications services within an exchange.⁴ The statute provides that one commercial mobile radio service provider can be counted as an entity providing basic local telecommunications services.⁵ The other entity that can be counted as providing basic local telecommunications services is one that provides "local voice service in whole or in part over telecommunications facilities or other facilities in which it or one of its affiliates have an ownership interest."⁶ Therefore, an exchange would be competitive in which two or more facilities-based wireline carriers are providing services to customers, or in which one facilities-based wireline carrier and one wireless carrier are providing services to customers.

CenturyTel's application indicates that it faces competition from at least one wireless carrier and one facilities-based wireline carrier for business services in its Branson, Ozark, and Troy exchanges, and for residential services in its Bourbon, Cabool, Cassville, Cuba, Forsyth, Kimberling City, and Mansfield exchanges, other than exchange access services.

⁴ Section 392.245.5(6), RSMo Cum. Supp. 2005.

⁵ Section 392.245.5(1), RSMo Cum. Supp. 2005.

⁶ Section 392.245.5(2), RSMo Cum. Supp. 2005.

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Findings of Fact

The Missouri Public Service Commission, having considered all of the verified pleadings and pre-filed testimony (including attachments), which are admitted into evidence, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

CenturyTel is a "local exchange telecommunications company" and a "public utility," and is authorized to provide "telecommunications service" within the state of Missouri as each of those phrases is defined in Section 386.020, RSMo 2000.⁷ CenturyTel is a large ILEC subject to price cap regulation.⁸

In its second amended application, CenturyTel requested that the Commission classify its business services, except for exchange access service, in its Branson, Ozark, and Troy exchanges as competitive.⁹ CenturyTel also requested that the Commission classify the residential services CenturyTel offers in its Bourbon, Cabool, Cassville, Cuba, Forsyth, Kimberling City, and Mansfield exchanges, other than exchange access services, as competitive.¹⁰ In addition, CenturyTel filed substitute tariff sheets reflecting those classifications.¹¹

In support of these requests, CenturyTel's verified application included a chart and other evidence indicating that at least one non-affiliated wireless carrier is currently providing service in all the relevant exchanges.¹² The application also included evidence that there are also wireline competitors in each of those exchanges that are facilities-based CLECs or cable operators who are currently providing local phone service via their own facilities to residential customers geographically located within the exchanges.¹³

Staff also provided its verified recommendation in which it discussed its own investigation into the companies providing wireless and wireline service to the relevant exchanges. According to Staff's

⁷ Application at 1-2.

⁸ *Id.* at 2.

⁹ Second Amended Application at 1-2.

¹⁰ *Id.*

¹¹ Staff Recommendation for Approval of Tariff Sheets at 1.

¹² Application at 4; Exhibits A, B, C2, D, E, G, H, I, J, L, and M2 to Application.

¹³ Application at 4-13; Exhibits A, B, C2, D, E, G, H, I, J, L, and M2 to Application.

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recommendation, the three exchanges for which CenturyTel requests competitive status of its business services (*i.e.*, Branson, Ozark, and Troy) all have at least one non-affiliated wireless provider and at least one non-affiliated facilities-based wireline carrier providing local voice service to business customers located within the exchanges.¹⁴ Furthermore, Staff advised that “the competing carriers have local numbers available for use by business customers in those exchanges.”¹⁵

Likewise, Staff’s verified recommendation also indicates that the exchanges for which CenturyTel requests competitive status of its residential services (*i.e.*, Bourbon, Cabool, Cassville, Cuba, Forsyth, Kimberling City, and Mansfield) all have at least one non-affiliated wireless provider and at least one non-affiliated facilities-based wireline carrier providing local voice service to residential customers with addresses within the exchanges,¹⁶ and that “the competing carriers have local numbers available for use by residential customers in those exchanges.”¹⁷

In addition to these verified pleadings, the record also contains the pre-filed direct testimony of Michael S. Scheperle, a regulatory economist for the Telecommunications Department Staff of the Commission who began his employment with the Commission in June 2000.¹⁸ Attached to his testimony is a variety of documentary materials upon which he relied in reaching his conclusions, including, but not limited to: affidavits and letters from representatives of various wireless and wireline providers¹⁹ and a chart summarizing the evidence he reviewed.²⁰

Mr. Scheperle testified that at least one wireless carrier unaffiliated with CenturyTel is providing local voice service to two or more business customers within the Branson, Ozark, and Troy exchanges.²¹ He also testified that a non-affiliated wireline carrier is providing local voice service to two or more business customers located within those exchanges using

¹⁴ Staff Recommendation at 1.

¹⁵ *Id.* at 1-2.

¹⁶ *Id.* at 2.

¹⁷ *Id.*

¹⁸ Scheperle testimony at 1-2.

¹⁹ Schedules 3-1 through 3-6, 4HC, 5-1 through 5-2, and 5-3P to Scheperle testimony.

²⁰ Schedule 2 to Scheperle testimony.

²¹ Scheperle testimony at 5-6. For the Branson exchange the carriers are Alltel, Cingular, Sprint PCS, and US Cellular; for the Ozark exchange, they are T-Mobile (ported numbers only), Cingular, and Sprint PCS; and for the Troy exchange the carriers are Cingular, Sprint PCS, and T-Mobile. *Id.*; Schedule 2 to Scheperle testimony. The Commission further notes there was also evidence that these wireless providers permit local dialing to and from numbers within the relevant exchanges.

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facilities it owns in whole or in part.²² Accordingly, Mr. Scheperle stated, Staff's recommendation was that CenturyTel's application for competitive classification of the business services provided in its Branson, Ozark, and Troy exchanges, other than exchange access services, be approved by the Commission.²³

Mr. Scheperle further testified that at least one wireless carrier unaffiliated with CenturyTel is providing local voice service to two or more residential customers within the Bourbon, Cabool, Cassville, Cuba, Forsyth, Kimberling City, and Mansfield exchanges.²⁴ He also testified that a non-affiliated wireline carrier is providing local voice service to two or more residential customers located within those exchanges using facilities it owns in whole or in part.²⁵ Therefore, Mr. Scheperle stated, Staff's recommendation was that CenturyTel's application for competitive classification of the residential services it provides in its Bourbon, Cabool, Cassville, Cuba, Forsyth, Kimberling City, and Mansfield exchanges, other than exchange access services, also be approved by the Commission.²⁶

The Commission finds that the facts as submitted in the verified second amended application, the verified Staff Recommendation, and the pre-filed testimony and related attached materials are reliable and support competitive classification of the business services CenturyTel offers in its Branson, Ozark, and Troy exchanges. The Commission finds that in each of those exchanges, facilities-based local voice service is being provided to at least two business customers by an unaffiliated wireline carrier. In addition, the Commission finds that there is at least one non-affiliated commercial mobile radio services carrier providing service to business customers in CenturyTel's Branson, Ozark, and Troy exchanges. The

²² Scheperle testimony at 8. For the Branson and Ozark exchanges the carrier is NuVox; and for the Troy exchange it is Socket. Schedule 2 to Scheperle testimony.

²³ Scheperle testimony at 9.

²⁴ *Id.* at 5-7. For the Bourbon and Kimberling City exchanges the carriers are Cingular and Sprint PCS; for the Cabool and Mansfield exchanges they are Cingular, Sprint PCS, and US Cellular; for the Cassville exchange they are T-Mobile (ported numbers only), Alltel, and Cingular; for the Cuba exchange they are T-Mobile (ported numbers only), Cingular, and Sprint PCS; and for the Forsyth exchange the carriers are Alltel, Cingular, Sprint PCS, and US Cellular. *Id.*; Schedule 2 to Scheperle testimony. The Commission further notes there was also evidence that these wireless providers permit local dialing to and from numbers within the relevant exchanges.

²⁵ Scheperle testimony at 7-9. For the Bourbon and Cuba exchanges the carrier is Charter; while for the Cabool, Cassville, Forsyth, Kimberling City, and Mansfield exchanges it is Mediacom. *Id.*; Schedule 2 to Scheperle testimony.

²⁶ Scheperle testimony at 9.

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Commission further finds that the competing carriers have local numbers available for use by business customers in those exchanges.

Moreover, the Commission finds that the facts as submitted in the record before it also support competitive classification of the residential services CenturyTel offers in its Bourbon, Cabool, Cassville, Cuba, Forsyth, Kimberling City, and Mansfield exchanges. The Commission finds that in each of those exchanges, facilities-based local voice service is being provided to at least two residential customers by an unaffiliated wireline carrier. In addition, the Commission finds that there is at least one non-affiliated commercial mobile radio services carrier providing service to residential customers in CenturyTel's Bourbon, Cabool, Cassville, Cuba, Forsyth, Kimberling City, and Mansfield exchanges. The Commission further finds that the competing carriers have local numbers available for use by residential customers in those exchanges.

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law:

The Commission has jurisdiction over this matter pursuant to Section 392.245.5(6), RSMo Cum. Supp. 2005, which provides as follows:

Upon request of an incumbent local exchange telecommunications company seeking competitive classification of business service or residential service, or both, the commission shall, within thirty days of the request, determine whether the requisite number of entities are providing basic local telecommunications service to business or residential customers, or both, in an exchange and if so, shall approve tariffs designating all such business or residential services other than exchange access, as competitive within such exchange.

CenturyTel is an incumbent local exchange telecommunications company and has requested competitive classification of its business services in the Branson, Ozark, and Troy exchanges and its residential services in the Bourbon, Cabool, Cassville, Cuba, Forsyth, Kimberling City, and Mansfield exchanges.

Section 392.245.5, RSMo Cum. Supp. 2005, provides as follows:

Each telecommunications service offered to business customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as

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competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to business customers within the exchange. Each telecommunications service offered to residential customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to residential customers within the exchange.

For the purpose of determining whether competitive status is appropriate in an exchange, one commercial mobile service provider can be considered an entity providing “basic local telecommunications services.”²⁷ The statute also requires the Commission to consider as a “basic local telecommunications service provider” any entity providing “local voice service in whole or in part over facilities in which it or one of its affiliates has an ownership interest.”²⁸

Section 392.245.5(3), RSMo Cum. Supp. 2005, defines “local voice service” as meaning “[r]egardless of the technology utilized . . . two-way voice service capable of receiving calls from a provider of basic local telecommunications services as defined by subdivision (4) of section 386.020, RSMo 2000.”

The statute defines “telecommunications facilities” to include, among other items, “lines, conduits, ducts, poles, wires, cables, receivers, transmitters, instruments, machines, appliances and all devices, real estate, easements, apparatus, property and routes used, operated, controlled or owned by any telecommunications company to facilitate the provision of telecommunications service.”²⁹

CenturyTel is asserting that its business and/or residential services in the relevant exchanges should be classified as competitive. As the party asserting the positive of a proposition, CenturyTel has the burden of proving that proposition.³⁰

²⁷ Section 392.245.5(1), RSMo Cum. Supp. 2005.

²⁸ Section 392.245.5(2), RSMo Cum. Supp. 2005.

²⁹ Section 386.020(52), RSMo 2000.

³⁰ *Dycus v. Cross*, 869 S.W.2d 745, 749 (Mo. banc 1994).

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Because the opportunity for an evidentiary hearing was provided and no proper party requested such a hearing, the Commission may rely on the verified pleadings filed by CenturyTel and Staff, as well as the pre-filed testimony Staff submitted, in making its decision in this case.³¹

Decision

The undisputed evidence establishes that for business customers in CenturyTel's Branson, Ozark, and Troy exchanges there is at least one non-affiliated entity providing local voice service in whole or in part over facilities in which it, or one of its affiliates, has an ownership interest so as to constitute the provision of basic local telecommunications within the meaning of Section 392.245.5(3), RSMo Cum. Supp. 2005. Furthermore, the undisputed evidence establishes that for business customers in those exchanges there is at least one non-affiliated wireless carrier providing basic local telecommunications service within the meaning of Section 392.245.5(1), RSMo Cum. Supp. 2005. Therefore, the Commission concludes that CenturyTel's application for competitive classification of its business services, other than exchange access services, in the Branson, Ozark, and Troy exchanges should be granted.

Likewise, the undisputed evidence establishes that for residential customers in CenturyTel's Bourbon, Cabool, Cassville, Cuba, Forsyth, Kimberling City, and Mansfield exchanges there is at least one non-affiliated entity providing local voice service in whole or in part over facilities in which it, or one of its affiliates, has an ownership interest so as to constitute the provision of basic local telecommunications within the meaning of Section 392.245.5(3), RSMo Cum. Supp. 2005. Furthermore, the undisputed evidence establishes that for residential customers in those exchanges there is at least one non-affiliated wireless carrier providing basic local telecommunications service within the meaning of Section 392.245.5(1), RSMo Cum. Supp. 2005. Therefore, the Commission concludes that CenturyTel's application for competitive classification of its residential services, other than exchange access services, in the Bourbon, Cabool, Cassville, Cuba, Forsyth, Kimberling City, and Mansfield exchanges should also be granted.

As required by the statute, CenturyTel submitted tariff changes to implement the competitive classification of its services. Those tariff sheets, which Staff recommended be approved, carry an effective date of June 16.

³¹ See, e.g., *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. W.D. 1989); n.3 *supra*.

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Since the submitted tariff corresponds with the Commission's decision, that tariff will be approved.

IT IS ORDERED THAT:

1. CenturyTel of Missouri, LLC's business services, other than exchange access service, are classified as competitive in the Branson, Ozark, and Troy exchanges.
2. CenturyTel of Missouri, LLC's residential services, other than exchange access service, are classified as competitive in the Bourbon, Cabool, Cassville, Cuba, Forsyth, Kimberling City, and Mansfield exchanges.
3. CenturyTel of Missouri, LLC's proposed tariff revisions (Tariff No. JI-2007-0839) are approved to become effective for service on or after June 16, 2007. The tariff approved is:

P.S.C. Mo. No. 1 Section 4

2nd Revised Sheet 1, Replacing 1st Revised Sheet 1

Original Sheet 17.2
Original Sheet 17.3
Original Sheet 17.4
Original Sheet 17.5
Original Sheet 17.6
Original Sheet 17.7
Original Sheet 17.8
Original Sheet 17.9
Original Sheet 17.10
Original Sheet 17.11
Original Sheet 17.12

4. This order shall become effective on June 16, 2007.

Davis, Chm., Murray, Gaw,
Clayton and Appling, CC., concur

Lane, Regulatory Law Judge

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Cathy J. Orler vs. Folsom Ridge, LLC and Big Island Homeowners Water and Sewer Association, Inc., f/k/a Big Island Homeowners Association

In the Matter of the Application of Folsom Ridge, L.L.C., and Big Island Homeowners Water and Sewer Association, Inc., for an Order Authorizing the Transfer and Assignment of Certain Water and Sewer Assets to Big Island Water Company and Big Island Sewer Company, and in Connection Therewith Certain Other Related Transactions

*Case No. WC-2006-0082, et al. and WO-2007-0277
Decided June 14, 2007*

Water § 6. A real estate developer and a non-profit homeowner's association that does not devote its water service to the public use indiscriminately to all members within its capabilities to serve is not a public utility, and is not subject to the Commission's jurisdiction.

Water § 19. The reservation of a tap-on is not the provision of water service and does not involve a use, accommodation, product or commodity as referenced in Section 386.020(47) [currently 286.020(48)].

Sewer § 5. A real estate developer and a non-profit homeowner's association that does not devote its sewer service to the public use indiscriminately to all members within its capabilities to serve is not a public utility, and is not subject to the Commission's jurisdiction.

Sewer § 17. The reservation of a tap-on is not the provision of sewer service and does not involve a use, accommodation, product or commodity as referenced in Section 386.020(47) [currently 286.020(48)].

APPEARANCES

Cathy J. Orler, appearing *pro se*, 3252 Big Island Drive, Roach, Missouri 65787.

Benjamin D. Pugh, appearing *pro se*, 1780 Big Island Drive, Roach, Missouri 65787.

Cindy Fortney, appearing *pro se*, 3298 Big Island Drive, Roach, Missouri 65787.

Stan Temares, appearing *pro se*, 371 Andrews Trail Court, St. Peters, Missouri 63376.

Mark. W. Comley, Newman, Comley & Ruth P.C., 600 Monroe Street, Suite 301, Post Office Box 537, Jefferson City, Missouri 65102. Attorney for Folsom Ridge, L.L.C. and Big Island Homeowners Water and Sewer Association, Inc.,

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Charles E. McElyea, Phillips, McElyea, Carpenter & Welch, P.C., 85 Court Circle, Post Office Box 559, Camdenton, MO 65020. Attorney for Folsom Ridge, L.L.C. and Big Island Homeowners Water and Sewer Association, Inc.

Pamela Holstead, 3458 Big Island Drive, Roach, Missouri 65787. Attorney for Big Island Water Company and Big Island Sewer Company.

Lewis R. Mills, Jr., Public Counsel, Office of the Public Counsel, Governor Office Building, Post Office Box 2230, Jefferson City, Missouri 65102. Attorney for Office of the Public Counsel and the Public.

Kevin Thompson, General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102. Attorney for the Staff of the Commission.

Jennifer Heintz, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102. Attorney for the Staff of the Commission.

REGULATORY LAW JUDGE: Harold Stearley

REPORT AND ORDER

Procedural History

The complaint portion of these proceedings began in August and September, 2005, when nine individual complainants filed complaints against Folsom Ridge, L.L.C., ("Folsom Ridge").¹ The complaints alleged that Folsom Ridge, a property development company developing real estate at Big Island, Lake of the Ozarks, Missouri, ("Big Island") was illegally operating a water and sewer system by providing service to the general public without a certificate of convenience and necessity from this Commission. The complaints also alleged that Big Island Homeowners Water and Sewer Association, Inc., f/k/a Big Island Homeowners Association, Inc., ("Association"), the homeowners association managing

¹ The nine original complaints were filed by the following parties: Cathy Orler, 3252 Big Island Drive, Roach, MO 65787 (Case No. WC-2006-0082); Benjamin D. Pugh, 1780 Big Island Drive, Roach, MO 65787 (Case No. WC-2006-0090); Ben F. Weir, 3515 SW Meyer Blvd., Blue Springs, MO 64015 (Case No. WC-2006-0107); Stan Temares, 371 Andrews Trail Court, St. Peters, MO 63376 (Case No. WC-2006-0120); Judy Kenter, 1794 Big Island Drive, Roach, MO 65787 (Case No. WC-2006-0121); Joseph J. Schrader, 1105 Yorktown Pl., DeLand, FL 32720 (Case No. WC-2006-0122); Duane Stoyer, 702 Ridgeview Drive, Washington, MO 63090 (Case No. WC-2006-0129); Cindy Fortney, 3298 Big Island Drive, Roach, MO 65787 (Case No. WC-2006-0138); Dean Leon Fortney, P.O. Box 1017, Louisburg, KS 66053 (Case No. WC-2006-0139).

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and operating the water and sewer systems, was merely a captive entity doing the bidding of Folsom Ridge.

On November 4, 2005, the Commission consolidated these actions pursuant to 4 CSR 240-2.110(3) finding that they involved related questions of law or fact. Case No. WC-2006-0082 was designated as the lead case.² As the case progressed, the Association was added as a separate respondent.

On June 16, 2006, Big Island Water & Sewer Company, Inc., a new company that is affiliated with Folsom Ridge, filed an application for a certificate of convenience and necessity to operate the water and sewer system currently being operated by Folsom Ridge and the Association. That application was assigned Case No. WA-2006-0480, and was set for hearing beginning on February 5, 2007.³ On June 27, 2006, in response to the filing of the application for certificate, the Commission suspended the proceedings in the complaint cases, WC-2006-0082, et al., until the certificate case could be resolved.

On January 23, 2007, Folsom Ridge and the Association filed a joint application asking the Commission to approve the transfer of water and sewer system assets to the Big Island Water Company and the Big Island Sewer Company, recently formed non-profit corporations organized under the provisions of Sections 393.825 to 393.861 and 393.900 to 393.954, RSMo 2000 ("Chapter 393 Companies").⁴ That application was assigned Case No. WO-2007-0277.⁵ The water and sewer system assets that were

² On June 13, 2006, Duane Stoyer's case was severed from the consolidated case because of his unfortunate death. Because no lawful representative was substituted as a party to his action pursuant to Supreme Court Rule 52.13(a), his case was dismissed by order effective August 13, 2006.

³ The following individuals were granted intervention in Case No. WA-2006-0480: Cathy Orler, 3252 Big Island Drive, Roach, MO 65787; Cindy Fortney, 3298 Big Island Drive, Roach, MO 65787; Benjamin D. Pugh, 1780 Big Island Drive, Roach, MO 65787; Joseph J. Schrader, 1105 Yorktown Pl., DeLand, FL 32720; Stan Temares, 1836 Big Island Drive, Roach, MO 65787; Ben F. Weir, 3515 SW Meyer Blvd., Blue Springs, MO 64015; Elaine H. and William T. Foley, II, 15360 Kansas Ave, Bonner Springs, KS 66012; Mark and Deborah Hesley, 2308 Big Island Drive, Roach, MO 65787; Don Deckard, 2218 Big Island Drive, Roach, MO 65787; Bernard J. Beaven, 13900 E 217, Peculiar, MO 64078; Jerry Steinhour, Lot 57, P.O. Box 737, Seneca, IL 61360; Joseph Geary Mahr, 5712 Dearborn Street, Mission, KS 66202; Arthur W. Nelson, 6504 Melody Lane, Parkville, MO 64152; Eugene Prather, 1604 Big Island Drive, Roach, MO 65787; Donald J. and Frances K. Weast, 5291 Kerth Road, Mehlville, MO 63128; Stephen D. Kleppe, 8210 E. Tether Trail, Scottsdale, AZ 85255.

⁴ All statutory citations refer to RSMo 2000 unless otherwise noted.

⁵ The following individuals were granted intervention in Case No. WO-2007-0277: Big Island Water Company, 3352 Big Island Drive, Roach, MO 65787; Big Island Sewer Company, 3352 Big Island Drive, Roach, MO 65787; William T. Foley, II, 15360 Kansas Ave., Bonner Springs,

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to be transferred to the non-profit corporations are the same assets that were to be transferred to Big Island Water & Sewer Company, Inc., the applicant in Case No. WA-2006-0480. The day after the new application was filed, January 24, 2007, Big Island Water & Sewer Company, Inc. filed a motion in Case No. WA-2006-0480 indicating that it no longer wanted to acquire the water and sewer assets in question and asked for leave to withdraw its application and to voluntarily dismiss that case. That leave was granted on January 26, 2007, and Case No. WA-2006-0480 was dismissed.

In Case No. WO-2007-0277, Folsom Ridge and the Association asked the Commission to act on their application to transfer assets expeditiously to allow the transaction to occur by March 31, 2007.⁶ The Commission observed that the complaints pending in Case No. WC-2006-0082, et al., related to the same issues that would be before the Commission in Case No. WO-2007-0277 and those issues needed to be resolved before the Commission could act on the application to transfer assets. Consequently, the Commission established a joint procedural schedule to resolve both cases. The cases were not formally consolidated, but the evidentiary hearing was set to hear both cases at the same time.

The Commission issued its adopted list of issues list identifying the relevant primary issues in these matters as follows:

Primary Issues in WC-2006-0082:

1.) Are Folsom Ridge or the Association, or both of them, a public utility pursuant to § 386.020(42), RSMo Supp. 2006, and thus subject to the jurisdiction, control and regulation of the Missouri Public Service Commission pursuant to § 386.250, RSMo Supp. 2006?

2.) Have Folsom Ridge or the Association, or both of them, violated § 393.170, RSMo 2000, by constructing and operating a water system or a sewer system, or both,

KS 66012; Benjamin D. Pugh, 1780 Big Island Drive, Roach, MO 65787; Cathy Jo Orler, 3252 Big Island Drive, Roach, MO 65787; Cindy Fortney, 3298 Big Island Drive, Roach, MO 65787; Arthur W. Nelson, 2288 Big Island Drive, Roach, MO 65787; Sherrie Fields, 3286 Big Island Drive, Roach, MO 65787; Tom and Sally Thorpe, 3238 Big Island Drive, Roach, MO 65787; Bernadette Sears, Portage Park 3, Lot 10, Big Island, Roach, MO 65787; Geary and Mary Mahr, 1886 Big Island Drive, Roach, MO 65787; Donald J. Weast, 3176 Big Island Drive, Roach, MO 65787; Fran Weast, 3176 Big Island Drive, Roach, MO 65787.

⁶ During the hearing the Respondents acknowledged that they would suspend the finalization of their proposed transfer of assets until such time as the Commission could fully adjudicate and rule on these matters.

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without having first obtained authority from the Commission in the form of a Certificate of Public Convenience and Necessity?

Primary Issue in WC-2007-0277:

Would Applicants' proposed transfer of the water and sewer assets to Big Island Water Company and Big Island Sewer Company be detrimental to the public interest?

The evidentiary hearing was conducted on February 28 through March 2, 2007. During the hearing, the Commission subpoenaed Mr. John MacEachen, an Environmental Specialist with the Missouri Department of Natural Resources ("DNR"), who is presently attached to its enforcement division. Mr. MacEachen testified on the last day of the hearing and he fielded questions from the Commission and the parties pertaining to photographs offered by Mr. Ben Pugh, particularly regarding the specifications and characteristics of flexible piping used for service lines on Big Island, and the manner in which service lines for water and sewer lines shared the same "metering" or access pit.

At the close of the hearing on March 2, 2007, Folsom Ridge and the Association sought leave to supply additional testimony on the nature of the service line installations, because this testimony deviated from the adopted list of issues, and that leave was granted. The Commission established an ancillary procedural schedule for submission of that testimony and testimony was received from Mr. James T. Crowder for Folsom Ridge and the Association. Rebuttal and Surrebuttal testimony was also allowed. In addition to receiving the additional prefiled testimony from the parties concerning the service lines, the Commission granted Complainants' request for an ancillary hearing to take additional testimony concerning this subject matter. The ancillary hearing was held on March 30, 2007.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. When making findings of fact based upon witness testimony, the Commission will assign the appropriate weight to the testimony of each witness based upon their qualifications, expertise and credibility with regard to the attested to subject matter.

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The Parties Entering Their Appearance At Hearing⁷

1. Cathy J. Orler, a *pro se* complainant in WC-2006-0082 and intervener in WO-2007-0277, is a homeowner on Big Island at the Lake of Ozarks; her residential address being located at 3252 Big Island Drive, Roach, MO 65787.⁸

2. Benjamin D. Pugh, a *pro se* complainant in WC-2006-0082 and intervener in WO-2007-0277, is a homeowner on Big Island at the Lake of Ozarks; his residential address being located at 1780 Big Island Drive, Roach, MO 65787.⁹

3. Cindy Fortney, a *pro se* complainant in WC-2006-0082 and intervener in WO-2007-0277, is a homeowner on Big Island at the Lake of Ozarks; her residential address being located at 3298 Big Island Drive, Roach, MO 65787.¹⁰

4. Stan Temares, a *pro se* complainant in WC-2006-0082, is a homeowner on Big Island at the Lake of Ozarks; his primary residential address being located at 371 Andrews Trail Court, St. Peters, MO 63376; his lake address being located at 1836 Big Island Drive, Roach, MO 65787.¹¹

5. Folsom Ridge is a limited liability company organized under the laws of the state of Colorado and authorized to engage in business in the state of Missouri.¹²

6. Folsom Ridge was formed in 1997 to engage in the business of owning and developing real property in the State of Missouri.¹³

7. Pursuing that development, Folsom Ridge purchased all, or nearly all of the undeveloped land on Big Island.¹⁴

⁷ The parties that failed to appear are: Ben F. Weir, Joseph J. Schrader, Judy Kenter, Dean Leon Fortney, Fran Weast, Donald J. Weast, Joseph Geary Mahr, Mary Mahr, Tom Thorpe, Sally Thorpe, Bernadette Sears, Sherrie Fields, Arthur W. Nelson, and William T. Foley, II.

⁸ Cathy J. Orler's Complaint (WC-2006-0082), p. 1; Hearing Exhibit 1, Prefiled Direct Testimony of Cathy J. Orler, p. 1, lines 1-2.

⁹ Benjamin D. Pugh's Complaint (WC-2006-0090), p. 1; Hearing Exhibit 4, Prefiled Direct Testimony of Benjamin D. Pugh, p. 1, lines 1-2.

¹⁰ Cindy Fortney's Complaint (WC-2006-0138), p. 1; Hearing Exhibit 7, Prefiled Direct Testimony of Cindy Fortney, p. 1, lines 1-2.

¹¹ Stan Temares's Complaint (WC-2006-0120), p. 1 and 4; Application to Intervene in Case No. WA-2006-0480 filed July 7, 2006, p. 1.

¹² Joint Application for Approval of Transfer of Assets to Non-Profit Companies Organized Under Chapter 393, RSMo, ("Joint Application"), paragraph 1, filed January 23, 2007; Exhibit 1 to the Joint Application.

¹³ Joint Application, paragraph 1; Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, p. 2, lines 7-18.

¹⁴ Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, p. 2, lines 7-18.

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8. Folsom Ridge owns certain assets used or useful in the provision of water and sewer service on Big Island.¹⁵

9. Big Island Homeowners Water and Sewer Association, Inc. (Association) is a nonprofit homeowners association organized under the laws of the State of Missouri.¹⁶

10. The Association is the operator and business administrator of the water and sewer systems owned by Folsom Ridge on Big Island.¹⁷

11. Big Island Water Company is a Missouri not-for-profit water company formed under the provisions of Chapter 393 for the purposes of providing water service to residents on Big Island.¹⁸

12. Big Island Sewer Company is a Missouri not-for-profit sewer company formed under the provisions of Chapter 393 for purposes of providing sewer service to residents on Big Island.¹⁹

13. The General Counsel of the Missouri Public Service Commission "represent[s] and appear[s] for the commission in all actions and proceedings involving any question under this or any other law, or under or in reference to any act, order, decision or proceeding of the commission . . ."²⁰

14. The Office of the Public Counsel "may represent and protect the interests of the public in any proceeding before or appeal from

¹⁵ Joint Application, paragraph 2; Exhibit 1 to the Joint Application; Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p.3, lines 8-14.

¹⁶ Joint Application, paragraph 2; Exhibit 2 to the Joint Application. The Association was originally named Big Island Homeowners Association, Inc. Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, p. 13, lines 15-19.

¹⁷ Joint Application, paragraph 2; Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 9, lines 8-15.

¹⁸ Application to Intervene, paragraph 1, filed January 30, 2007; Exhibit A to the Application to Intervene; Hearing Exhibit 98, Prefiled Direct Testimony of Gail Snyder, p. 1, lines 3-12.

¹⁹ Application to Intervene, paragraph 2, filed January 30, 2007; Exhibit B to the Application to Intervene; Hearing Exhibit 98, Prefiled Direct Testimony of Gail Snyder, p. 1, lines 3-12.

²⁰ Section 386.071, RSMo 2000; Commission Rules 4 CSR 240-2.010(8) and 4 CSR 240-2.040(1). Additionally, the General Counsel "if directed to do so by the commission, to intervene, if possible, in any action or proceeding in which any such question is involved; to commence and prosecute in the name of the state all actions and proceedings, authorized by law and directed or authorized by the commission, and to expedite in every way possible, to final determination all such actions and proceedings; to advise the commission and each commissioner, when so requested, in regard to all matters in connection with the powers and duties of the commission and the members thereof, and generally to perform all duties and services as attorney and counsel to the commission which the commission may reasonably require of him." *Id.*

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the public service commission. “²¹ Public Counsel “shall have discretion to represent or refrain from representing the public in any proceeding.”²²

The Parties Failing to Appear At Hearing

15. Concerning the parties that failed to appear at the evidentiary hearing:

a. Ben F. Weir, complainant in Case No. WC-2006-0082, asserts that he: (1) is not a member of the Association; (2) has not paid any fees for a tap-on to the water or sewer system or for reserving rights to tap-on; (3) does not receive water or sewer service from the Association; and, (4) has his own private well for drinking water and his own sanitary septic system. Mr. Weir alleges that Folsom Ridge and the Association have engaged in misrepresentation, fraud, creating health hazards and lowering property values.²³

No evidence was offered or adduced at hearing to support factual findings regarding Mr. Weir’s allegations. Mr. Weir failed to establish that he has a protectible interest in this matter and therefore lacks standing to proceed with his complaint.²⁴ Mr. Weir also failed to prosecute his

²¹ Section 386.710(2), RSMo 2000; Commission Rules 4 CSR 240-2.010(16) and 4 CSR 240-2.040(2).

²² Section 386.710(3), RSMo 2000; Commission Rules 4 CSR 240-2.010(16) and 4 CSR 240-2.040(2). Public Counsel “shall consider in exercising his discretion the importance and the extent of the public interest involved and whether that interest would be adequately represented without the action of his office. If the public counsel determines that there are conflicting public interests involved in a particular matter, he may choose to represent one such interest based upon the considerations of this section, to represent no interest in that matter, or to represent one interest and certify to the director of the department of economic development that there is a significant public interest which he cannot represent without creating a conflict of interest and which will not be protected by any party to the proceeding.” *Id.*

²³ Ben F. Weir’s Complaint (WC-2006-0107), p. 1-4

²⁴ Assertions or allegations in pleadings do not constitute evidence. The complaint was not verified by affidavit and did not contain any authenticated and verified supporting documentation to support any claim or allegation. It is well established legal doctrine that unsworn statements of attorneys or parties, statements in briefs, pleadings, motions, arguments, allegations, or charging documents, as well as articles or exhibits not formally or constructively introduced are not evidence of the facts asserted unless conceded to by the opposing party. *State ex rel. TWA, Inc. v. David*, 158 S.W.3d 232, 236 (Mo. Banc 2005) (Judge White Dissenting), *citing to*, *State ex rel. Dixon v. Darnold*, 939 S.W.2d 66, 69 (Mo. App. 1997); *State v. Smith*, 154 S.W.3d 461, 469 (Mo. App. 2005); *Lester v. Sayles*, 850 S.W.2d 858, 864 (Mo. Banc 1993); *State v. Rutter*, 93 S.W.3d 714, 727 (Mo. Banc 2002); *State v. Robinson*, 825 S.W.2d 877, 880 (Mo. App. 1992); *State ex rel. Horn v. Randall*, 275 S.W.2d 758, 763-764 (Mo. App. 1955). To have legal standing to prosecute a legal action a party

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complaint in any manner other than filing the original complaint form and, pursuant to 4 CSR 240-2.116(2), is subject to dismissal for failure to prosecute. Additionally, his complaint is subject to dismissal pursuant to Commission Rule 4 CSR 240-2.116(3) for failure to appear at the evidentiary hearing.

b. Joseph J. Schrader, complainant in Case No. WC-2006-0082, made no averments as to his status as an Association member or how he obtains or provides for his own water and sewer services. Mr. Schrader alleges Folsom Ridge and the Association have engaged in misrepresentation and fraud concerning the provision of water and sewer services. Mr. Schrader's complaint states that he has moved to Florida and that a realtor found a buyer for his home on Big Island in 2003. There is no evidence in the record to support a factual finding that Mr. Schrader is a current homeowner on Big Island.²⁵

No evidence was offered or adduced at hearing to support factual findings regarding Mr. Schrader's allegations. Mr. Schrader failed to establish that he has a protectible interest in this matter and therefore lacks standing to proceed with his complaint.²⁶ Mr. Schrader also failed to prosecute his complaint in any manner other than filing the original complaint form and, pursuant to 4 CSR 240-2.116(2), is subject to dismissal for failure to prosecute. Additionally, his complaint is subject to dismissal pursuant to Commission Rule 4 CSR 240-2.116(3) for failure to appear at the evidentiary hearing.

seeking relief must have a legally cognizable interest in the subject matter and he or she must be facing a threatened injury or have suffered actual injury. *Eastern Missouri Laborers Dist. Council v. St. Louis County*, 781 S.W.2d 43, 46 (Mo. banc 1989). "A legally protectible interest contemplates a pecuniary or personal interest directly in issue or jeopardy which is subject to some consequential relief, immediate or prospective." *Absher v. Cooper*, 495 S.W.2d 696, 698 (Mo. App. 1973). The Commission recognized that the conclusion concerning standing is a legal conclusion, but found it convenient to place that conclusion within the findings of fact section. The Commission will further address these issues in its Decision Section of the Report and Order.

²⁵ Joseph J. Schader Complaint (WC-2006-0122), p. 1-4.

²⁶ See FN 24, *supra*.

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c. Judy Kenter, complainant in Case No. WC-2006-0082, asserts that she has: (1) owned her home since 1961; (2) paid a tap-on fee of \$4800 for sewer service to Folsom Ridge prior to January 1999; (3) paid a reservation fee to ensure her right to hook onto the system starting in December 2000; and (4) hooked onto the sewer system and pays the Association for services. Ms. Kenter also states that she is not a member of the Association and alleges that Folsom Ridge and the Association have engaged in misrepresentation and fraud concerning the provision of water and sewer services.²⁷

No evidence was offered or adduced at hearing to support factual findings regarding Ms. Kenter's allegations. Ms. Kenter failed to establish that she has a protectible interest in this matter and therefore lacks standing to proceed with her complaint.²⁸ Ms. Kenter also failed to prosecute her complaint in any manner other than filing the original complaint form and, pursuant to 4 CSR 240-2.116(2), is subject to dismissal for failure to prosecute. Additionally, her complaint is subject to dismissal pursuant to Commission Rule 4 CSR 240-2.116(3) for failure to appear at the evidentiary hearing.

d. Dean Leon Fortney, complainant in Case No. WC-2006-0082, asserts: (1) he purchased a tap-on for the sewer system from Folsom Ridge for \$4800; (2) he is not a member of the Association; and (3) he sold his house on Big Island on July 21, 2005. Mr. Fortney further alleges that Folsom Ridge attempted to interfere with the sale of his home by misrepresenting to his realtor that he owes back fees for reserving his tap-on and that the new owners would be required to pay reservations fees and join the Association when closing on the purchase.²⁹ Mr. Fortney is also a co-owner of property owned by his daughter Cindy Fortney, another complainant in this matter.³⁰ Mr. Fortney's joint ownership of Big Island property would

²⁷ Judy Kenter Complaint (WC-2006-0121), p. 1-2.

²⁸ See FN 24, *supra*.

²⁹ Dean Leon Fortney Complaint (WC-2006-0139), p. 1-4.

³⁰ Transcript p. 500, lines 2-5.

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constitute a protectible interest and give Mr. Fortney standing to proceed with his complaint.³¹

However, no evidence was offered or adduced at hearing to support factual findings regarding Mr. Fortney's allegations. Mr. Fortney also failed to prosecute his complaint in any manner other than filing the original complaint form and, pursuant to 4 CSR 240-2.116(2), is subject to dismissal for failure to prosecute. Additionally, his complaint is subject to dismissal pursuant to Commission Rule 4 CSR 240-2.116(3) for failure to appear at the evidentiary hearing.

e. Intervener Fran Weast filed a single page application to intervene in Case No. WO-2007-0277, indicating she opposed transfer of the water and sewer assets. No evidence was offered or adduced at hearing to support any factual findings regarding Ms. Weast's position on the transfer. Ms. Weast failed to establish that she has a protectible interest in this matter and therefore lacks standing to proceed in this matter.³² Additionally, she is subject to dismissal pursuant to Commission Rule 4 CSR 240-2.116(3) for failure to appear at the evidentiary hearing.

f. Intervener Donald J. Weast filed a single page application to intervene in Case No. WO-2007-0277, indicating he opposed transfer of the water and sewer assets. No evidence was offered or adduced at hearing to support any factual findings regarding Mr. Weast's position on the transfer. Mr. Weast failed to establish that he has a protectible interest in this matter and therefore lacks standing to proceed in this matter.³³ Additionally, he is subject to dismissal pursuant to Commission Rule 4 CSR

³¹ See FN 24, *supra*

³² See FN 24, *supra*. Commission Rule 4 CSR 240-2.075 establishes a low threshold to gain entrance into a case before the Commission. All a person or entity must do is identify an interest that is different from that of the general public, which might be adversely affected by a final order of the Commission. Alternatively, a person or entity may intervene if it is established that their presence would serve the public interest. A grant of intervention, however, does not excuse a party from active participation in a proceeding and failure to proffer any evidence in a matter once granted intervention results in a failure to establish standing to remain in the action.

³³ See FN 32, *supra*.

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240-2.116(3) for failure to appear at the evidentiary hearing.

g. Intervener Joseph Geary Mahr filed a single page application to intervene in Case No. WO-2007-0277, indicating he opposed transfer of the water and sewer assets. No evidence was offered or adduced at hearing to support any factual findings regarding Mr. Mahr's position on the transfer. Mr. Mahr failed to establish that he has a protectible interest in this matter and therefore lacks standing to proceed in this matter.³⁴ Additionally, he is subject to dismissal pursuant to Commission Rule 4 CSR 240-2.116(3) for failure to appear at the evidentiary hearing.

h. Intervener Mary Mahr joined Joseph Geary Mahr in filing a single page application to intervene in Case No. WO-2007-0277, indicating she opposed the transfer of water and sewer assets. No evidence was offered or adduced at hearing to support any factual findings regarding Ms. Mahr's position on the transfer. Ms. Mahr failed to establish that she has a protectible interest in this matter and therefore lacks standing to proceed in this matter.³⁵ Additionally, she is subject to dismissal pursuant to Commission Rule 4 CSR 240-2.116(3) for failure to appear at the evidentiary hearing.

i. Intervener Tom Thorpe filed a single page application to intervene in Case No. WO-2007-0277, indicating he opposed the transfer of water and sewer assets. No evidence was offered or adduced at hearing to support any factual findings regarding Mr. Thorpe's position on the transfer. Mr. Thorpe failed to establish that he has a protectible interest in this matter and therefore lacks standing to proceed in this matter.³⁶ Additionally, he is subject to dismissal pursuant to Commission Rule 4 CSR 240-2.116(3) for failure to appear at the evidentiary hearing.

j. Intervener Sally Thorpe joined Tom Thorpe in filing a single page application to intervene in Case No. WO-

³⁴ See FN 32, *supra*.

³⁵ See FN 32, *supra*.

³⁶ See FN 32, *supra*.

2007-0277, indicating she opposed the transfer of water and sewer assets. No evidence was offered or adduced at hearing to support any factual findings regarding Ms. Thorpe's position on the transfer. Ms. Thorpe failed to establish that she has a protectible interest in this matter and therefore lacks standing to proceed in this matter.³⁷ Additionally, she is subject to dismissal pursuant to Commission Rule 4 CSR 240-2.116(3) for failure to appear at the evidentiary hearing.

k. Intervener Bernadette Sears filed a single page application to intervene in Case No. WO-2007-0277, indicating she opposed the transfer of water and sewer assets. No evidence was offered or adduced at hearing to support any factual findings regarding Ms. Sears's position on the transfer. Ms. Sears failed to establish that she has a protectible interest in this matter and therefore lacks standing to proceed in this matter.³⁸ Additionally, she is subject to dismissal pursuant to Commission Rule 4 CSR 240-2.116(3) for failure to appear at the evidentiary hearing.

l. Intervener Sherrie Fields filed a single page application to intervene in Case No. WO-2007-0277, without indicating any position regarding the proposed transfer of water and sewer assets. No evidence was offered or adduced at hearing to support any factual findings regarding Ms. Fields's unidentified position on the transfer. Ms. Fields failed to establish that she has a protectible interest in this matter and therefore lacks standing to proceed in this matter.³⁹ Additionally, she is subject to dismissal pursuant to Commission Rule 4 CSR 240-2.116(3) for failure to appear at the evidentiary hearing.

m. Intervener Arthur W. Nelson filed a single page application to intervene in Case No. WO-2007-0277, indicating he opposed the transfer of water and sewer assets. No evidence was offered or adduced at hearing to support any factual findings regarding Mr. Nelson's

³⁷ See FN 32, *supra*.

³⁸ See FN 32, *supra*.

³⁹ See FN 32, *supra*.

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position on the transfer. Mr. Nelson failed to establish that he has a protectible interest in this matter and therefore lacks standing to proceed in this matter.⁴⁰ Additionally, he is subject to dismissal pursuant to Commission Rule 4 CSR 240-2.116(3) for failure to appear at the evidentiary hearing.

n. Intervener William T. Foley, II filed a single page application to intervene in Case No. WO-2007-0277, indicating he opposed the transfer of water and sewer assets. No evidence was offered or adduced at hearing to support any factual findings regarding Mr. Foley's position on the transfer. Mr. Foley failed to establish that he has a protectible interest in this matter and therefore lacks standing to proceed in this matter.⁴¹ Additionally, he is subject to dismissal pursuant to Commission Rule 4 CSR 240-2.116(3) for failure to appear at the evidentiary hearing.

Facts Related to the Exercise of the Commission's Jurisdiction

16. The area known as Big Island is located north of Roach, Missouri in Camden County, Missouri.⁴²

17. Big Island is approximately 160 acres in size, with most of the present development along the lake shore.⁴³

18. There have been individual property owners in the area for several decades, but, beginning in 1997, Folsom Ridge purchased nearly all of the undeveloped land on Big Island, as well as 190 acres adjacent to Big Island to engage in structured land development.⁴⁴

19. There are approximately 105 property owners on Big Island.⁴⁵

20. Folsom Ridge began constructing a community water system and a wastewater treatment facility in 1998 for use by owners of newly

⁴⁰ See FN 32, *supra*.

⁴¹ See FN 32, *supra*.

⁴² Hearing Exhibit 104, Prefiled Rebuttal Testimony of James A. Merciel, Jr., Attached Staff Report of Investigation for Case No. WC-2006-0082 et al., February 9, 2006, p. 1.

⁴³ Hearing Exhibit 104, Prefiled Rebuttal Testimony of James A. Merciel, Jr., Attached Staff Report of Investigation for Case No. WC-2006-0082 et al. February 9, 2006, p. 1.

⁴⁴ Hearing Exhibit 104, Prefiled Rebuttal Testimony of James A. Merciel, Jr., Attached Staff Report of Investigation for Case No. WC-2006-0082 et al. February 9, 2006, p. 1; Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, p. 2, lines 7-18.

⁴⁵ Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 9, line 3; Transcript p. 199, lines 17-18, p. 585, lines 11-13, p. 586, lines 2-5, p. 644, lines 6-9.

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developed lots and to provide the option of hooking on to the system to existing individual homeowners.⁴⁶

21. Folsom Ridge intended to transfer the operation, management and maintenance of the water and sewer facilities to some type of homeowners association and the Association was established on July 16, 1998 for that purpose.⁴⁷

22. On November 10, 1998, a letter from David Lees, member of Folsom Ridge, was mailed to the Big Island Homeowners stating that Folsom Ridge would fund 100% of the cost to provide the water and sewer systems initially, but that once the systems were complete they would turn the systems over to the Association in exchange for the escrow funds, comprised of the tap-on fees.⁴⁸

23. The November 10, 1998 letter also instructed the recipients that "... only those people who choose to hook onto the sewer or water system will be affected by the Association." The letter further stated the Association would "maintain the system by assessing its members a monthly fee."⁴⁹

24. On July 20, 2000, the members of Folsom Ridge mailed a letter to the members of the Association informing them, *inter alia*, that based upon the membership's recommendation, a monthly assessment of \$5.00 to \$10.00 would be charged to those people who had purchased the right to tap onto the system, but who had not yet tapped on. This charge was levied to provide for maintenance of the system.⁵⁰

25. As of November 29, 2000, the water and sewer systems were available to the entire island for use by the new owners of the lots being sold and/or developed by Folsom Ridge and giving existing residents an

⁴⁶ Hearing Exhibit 104, Prefiled Rebuttal Testimony of James A. Merciel, Jr., Attached Staff Report of Investigation for Case No. WC-2006-0082 et al. February 9, 2006, p. 1.

⁴⁷ Hearing Exhibit 104, Prefiled Rebuttal Testimony of James A. Merciel, Jr., Attached Staff Report of Investigation for Case No. WC-2006-0082 et al. February 9, 2006, p. 1; Hearing Exhibit 10, Prefiled Rebuttal Testimony of Rick Rusaw, p. 17, line 11; Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, p. 13, lines 18-19.

⁴⁸ Hearing Exhibit 88, Letter from David Lees to Big Island Homeowners, dated November 10, 1998.

⁴⁹ Hearing Exhibit 88, Letter from David Lees to Big island Homeowners, dated November 10, 1998. Findings of Fact Numbers 24, 48, 49, 50, and 51 delineate the fees that the Association charges for service and maintenance. Fees for water and sewer service are billed as "member dues." See Finding of Fact Number 69.

⁵⁰ Hearing Exhibit 96, Letter from Folsom Ridge members to Jim and Jeanette Schrader, dated July 20, 2000.

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option to connect to these systems should their existing water and/or sewer systems fail.⁵¹

26. The water system is comprised of the following components:

a. a single water supply well with a capacity that is adequate to serve 320 residential customers;

b. three twelve-foot non-pressure ground storage tanks with a storage capacity between 12,000 and 15,000 gallons combined that were designed to serve 80 residential customers, which are currently being replaced with a standpipe designed to serve 320 residential customers;

c. a booster pumping system that can deliver a flow of approximately 100 gallons per minute with plans to upgrade it to supply 140 gallons per minute; and,

d. a distribution system composed of approximately 2 miles of 4 inch schedule 40 PVC pipe forming a loop in the service area that is adequately sized to serve 320 residential customers.⁵²

27. The sewer system is comprised of the following components:

a. a septic tank effluent pumping (STEP) pressure collection system;

b. approximately 2 miles of PVC pressurized collection lines, varying between two and four inches in diameter, looping the service area, and connecting to the septic tank installed for each residence;

c. individual home septic tanks, owned and maintained by the property owner, that collect and treat solids, and pump the gray water from the septic tanks through the small diameter pipes to the recirculating sand filter; and,

d. a recirculating sand filter treatment facility designed to treat 22,525 gallons per day, with a capacity to serve 80 residential customers, which is currently being upgraded to provide for

⁵¹ Hearing Exhibit 97, Letter from the Association (Reggie Golden) to Jeffery and Cathy Litty (Orler), dated November 29, 2000.

⁵² Hearing Exhibit 104, Prefiled Rebuttal Testimony of James A. Merciel, Jr., Attached Staff Report of Investigation for Case No. WC-2006-0082 et al. February 9, 2006, p. 2; Hearing Exhibit 17, Hearing Exhibit 17, Prefiled Direct Testimony of Michael T. McDuffey, p. 3, lines 1-9; Hearing Exhibit 14, Prefiled Direct Testimony of David Krehbiel, p. 3, lines 4-12.

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treatment of an additional flow of 41,625 gallons per day to serve a total of 230 customers.⁵³

28. Folsom Ridge executed its Amended and Restated Declaration of Covenants and Conditions ("Declaration") on January 10, 2001, establishing covenant and conditions regarding the property its water and sewer system would serve.⁵⁴ The Declaration was recorded at Book 508, Page 597 of the records of the Camden County Records Office.⁵⁵

29. The Declaration establishes the terms for Association membership, voting rights for the members, and the members' and Association's respective responsibilities with relation to the operation, maintenance and provision of water and sewer services to the property owners.⁵⁶

30. The Declaration replaced the prior Declaration of Covenant and Conditions that was recorded on April 14, 2000 at Book 494, Page 577 of the records of the Camden County Records Office and it added additional property listings that would be able to utilize the water and sewer systems, subject to the covenants and conditions.⁵⁷

31. Article III, Section 1 of the Declaration provides in pertinent part: "An Owner of a Lot Shall become a member in the Association upon conveyance to him of his interest in a Lot and shall remain a member for the period of his ownership."⁵⁸

⁵³ Hearing Exhibit 104, Prefiled Rebuttal Testimony of James A. Merciel, Jr., Attached Staff Report of Investigation for Case No. WC-2006-0082 et al. February 9, 2006, p. 2; Hearing Exhibit 17, Prefiled Direct Testimony of Michael T. McDuffey, p. 5, lines 1-22; Hearing Exhibit 14, Prefiled Direct Testimony of David Krehbiel, p. 3, lines 14-23.

⁵⁴ Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, Attachment Schedule 6; Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 9, lines 8-15; See also Hearing Exhibit 46, Amended and Restated By-Laws of Big Island Homeowners Association, Inc.

⁵⁵ Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, Attachment Schedule 6; Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 9, lines 8-15. See also Hearing Exhibit 46, Amended and Restated By-Laws of Big Island Homeowners Association, Inc.

⁵⁶ Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, Attachment Schedule 6. See also Hearing Exhibit 46, Amended and Restated By-Laws of Big Island Homeowners Association, Inc.

⁵⁷ Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, Attachment Schedule 6; Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 9, lines 8-15; See also Hearing Exhibit 46, Amended and Restated By-Laws of Big Island Homeowners Association, Inc.

⁵⁸ Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, Attachment Schedule 6, p. 3, Article III, Section 1; Hearing Exhibit 46, Amended and Restated By-Laws of Big Island Homeowners Association, Inc., Article III, Section 1.

Article I, Section 13 defines "Owner" as "the record owner, whether one or more persons or entities, of a fee simple title to any Lot, including contract sellers, but excluding those having such interest merely as security for the performance of an obligation." *Id.*

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32. Article V, Section 1 of the Declaration states: "Every Owner of the Property and/or a Lot shall be a member of the Association. Membership shall be appurtenant to and may not be separate from ownership of any Property and/or Lot, except by mutual written agreement of the Association and the Owner."⁵⁹

33. Article V, Section 2 of the Declaration provides, in pertinent part: "The Association shall have one class of voting membership which shall be all Owners and shall be entitled to one vote for each Lot owned or connected to either the Water System or the Sewer System."⁶⁰

34. Article V, Section 3 of the Declaration provides, in pertinent part: "Decision of the Association shall be by majority of votes cast at any meeting, except as otherwise provided hereinabove."⁶¹

35. Article IV, Section 1 of the Declaration provides, in pertinent part: "The Declarant, for each Lot owned within the Property and each Owner of a Lot ratifying this Declaration, hereby covenants, and each Owner of any Lot by acceptance of a deed therefore, whether or not it shall be so expressed in such deed, is deemed to covenant and agree to pay to the Association for each Lot connected to the Water and Sewer System: (i) annual assessments or charges, and (ii) special assessments for capital improvements, such assessments to be established and collected as hereinafter provided."⁶²

Article I, Section 9 defines "Lot" as referring to "any plot of land and improvements thereon designated as a Lot on any subdivision filings or for purposes of the purchaser constructing residential improvements, and for which a connection to the Water and/or Sewer System is intended and shall include any portion of the Property conveyed by the Declarant or other real property which is added, in the future, to the terms of this Declaration by ratification or other document whereby such other property is intended to be bound by the terms of this Declaration." *Id.*

Article I, Section 14 defines "Property" as "that certain real property described on Exhibit "A" attached hereto and such additions thereto as may hereafter be brought within the jurisdiction of the Association." *Id.*

⁵⁹ Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, Attachment Schedule 6, p. 9, Article V, Section 1; Hearing Exhibit 46, Amended and Restated By-Laws of Big Island Homeowners Association, Inc., Article III, Section 1.

⁶⁰ Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, Attachment Schedule 6, p. 9, Article V,

Section 2; Hearing Exhibit 46, Amended and Restated By-Laws of Big Island Homeowners Association, Inc., Article III, Section 1. Transcript, p. 584, lines 19-25, p. 585, lines 1-10.

⁶¹ Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, Attachment Schedule 6, p. 9, Article V, Section 3.

⁶² Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, Attachment Schedule 6, p. 6, Article IV, Section 1.

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36. Approximately 60 of Big Island's residents have signed a ratification agreement to become members of the Association and abide by the Declaration.⁶³

37. While Folsom Ridge currently holds the majority of votes by virtue of its ownership of the majority of lots, the Association has never exercised its right to fully vote its majority when decisions have been made by the Association.⁶⁴

38. The Association's decisions are made by the majority vote of non-Folsom Ridge members, and Folsom Ridge has never over-ridden the majority of the remaining membership by exercising its votes.⁶⁵

39. The Association offers water and sewer services to persons owning real property on Big Island that is not described in its Declaration, but only to those persons whose property is proximate to the water mains and wastewater collection lines installed for the systems and who have agreed to pay the required tap-on fees.⁶⁶

40. All persons who use the water and sewer system are expected to pay for the service, and membership in the Association is an expected part of receiving service.⁶⁷

41. The Association began operating the water distribution system and wastewater facilities when its first customers connected in late 1999 and early 2000.⁶⁸

42. The Association began billing customers for water and sewer service in January 2001.⁶⁹

43. The Association's existing customers consist of both full-time and part-time residents.⁷⁰

⁶³ Transcript p. 585, lines 14-21, p. 586, lines 6-9.

⁶⁴ Transcript p. 587, lines 20-25, p. 588, lines 1-25, p. 589, lines 1-12, p. 645, lines 4-25.

⁶⁵ *Id.*

⁶⁶ Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p.10, lines 15-21. Transcript p. 590, lines 3-9.

⁶⁷ Hearing Exhibit 10, Prefiled Rebuttal Testimony of Rick Rusaw, p. 8. line 23, p. 9, lines 1-7. Transcript p. 634, lines 10-12 (Anyone connected to the system is considered to be a member and has full membership rights. See also Findings of Fact Numbers 70-75).

⁶⁸ Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, p. 13, lines 21-23. Benjamin D. Pugh's Complaint (WC-2006-0090), p. 2; Hearing Exhibit 48, Letter to Benjamin and Karen Pugh from the Association, dated April 9, 2001; Hearing Exhibit 49, Invoice from the Association to Benjamin and Karen Pugh, dated April 9, 2001; Hearing Exhibit 50, Letter to R. V. Golden from Benjamin D. Pugh, dated April 14, 2001.

⁶⁹ *Id.*

⁷⁰ Hearing Exhibit 104, Prefiled Rebuttal Testimony of James A. Merciel, Jr., Attached Staff Report of Investigation for Case No. WC-2006-0082 et al. February 9, 2006, p. 2.

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44. There are approximately a total of 60 customers connected to, and served by, the wastewater system.⁷¹

45. There are approximately a total of 49 customers connected to, and served by, the water distribution system.⁷²

46. There are approximately 33 households who have paid connection or tap-on fees that have not connected to the system.⁷³

47. There are approximately a total of 92 customers that are billed by the Association.⁷⁴

48. The rates for sewer service are currently \$15.00 per month.⁷⁵

49. The rates for water service are currently \$10.00 per month.⁷⁶

50. Members and non-members of the Association who are not connected to the systems are currently charged \$5.00 per month for water and \$5.00 per sewer, not for utility services but as reservation/maintenance fees to cover the costs of making the facilities available for connection and maintaining those facilities.⁷⁷

51. The reservation/maintenance fees are not charges for utility services.⁷⁸

52. Other Commission regulated companies charge similar reservation/maintenance fees, these are untariffed charges and these fees do not constitute a charge for utility service.⁷⁹

⁷¹ Joint Application, paragraph 3; Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 8, line 22; Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, p. 14, lines 15-18; Transcript p. 644, lines 6-9.

⁷² Joint Application, paragraph 3; Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 8, lines 22-23; Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, p. 14, lines 15-18; Transcript p. 644, lines 6-9, p. 1088, lines 6-9

⁷³ Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, p. 14, lines 20-23. Transcript p. 582, lines 5-7.

⁷⁴ Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 8, line 27; Transcript p. 580, lines 4-9.

⁷⁵ Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, p. 15, lines 11-17.

⁷⁶ *Id.*

⁷⁷ Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, p. 15, lines 11-17. Transcript p. 581, lines 13-25, p. 582, lines 1-9. Transcript, p. 470, lines 8-25, pp. 471-473, p. 474, lines 1-12.

⁷⁸ Transcript, p. 1095, lines 3-25. p. 1096, lines 1-9.

⁷⁹ Transcript pp. 1093-1096. As defined in Section 386.020(47): "Service includes not only the use and accommodations afforded consumers or patrons, but also any product or commodity furnished by any corporation, person or public utility and the plant, equipment, apparatus, appliances, property and facilities employed by any corporation, person or public utility in performing any service or in furnishing any product or commodity and devoted to the public purposes of such corporation, person or public utility, and to the use and accommodation of consumers or patrons." The reservation of a tap-on is not the provision of water or sewer service. The reservation of a tap-on is also not an "accommodation." "Accommodation"

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53. The Association is a not-for-profit or stock corporation and Folsom Ridge has no ownership interest in the Association.⁸⁰

54. Folsom Ridge is a member of the Association by virtue of its ownership of lots covered by the Declaration.⁸¹

55. The Association has never declared a dividend to Folsom Ridge or any of its members.⁸²

56. Folsom Ridge has never received a fee, commission, or any remuneration from the Association from the rates charged by the Association for water or sewer service.⁸³

57. The rates charged by the Association are designed to cover the actual costs of operating and maintaining the system, not profit, i.e. the contract operator's charges, the cost of billing and the cost of permits required by environmental and other agencies.⁸⁴

58. Any excess revenue collected by the Association above actual costs of operation and maintenance of the water and sewer systems is retained for future liquidity and working capital. This revenue is deposited into a reserve account to cover or defray unexpected or unanticipated costs

means: "an arrangement or engagement made as a favor to another, not upon consideration received." Black's Law Dictionary, 6th Ed. West Publishing Co. 1990, p. 16. Clearly, paying a tap-on fee is not a favor without legal consideration.

The tap-on is part of the "water system" or "sewer system" as defined by sections 386.020(49) and (59). Section 386.020(49) defines "sewer system" as including "all pipes, pumps, canals, lagoons, plants, structures and appliances, and all other real estate, fixtures and personal property, owned, operated, controlled or managed in connection with or to facilitate the collection, carriage, treatment and disposal of sewage for municipal, domestic or other beneficial or necessary purpose." Section 386.020(59) defines "water system" as including "all reservoirs, tunnels, shafts, dams, dikes, headgates, pipes, flumes, canals, structures and appliances, and all other real estate, fixtures and personal property, owned, operated, controlled or managed in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing or carriage of water for municipal, domestic or other beneficial use."

⁸⁰ Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 9, lines 17-20. Transcript p. 587, lines 3-11.

⁸¹ Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 9, lines 17-20.

⁸² Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 9, line 22, p. 10, lines 1-4; Hearing Exhibit 13, Prefiled Direct Testimony of William A. Hughes, p. 2, lines 8-9.

⁸³ Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p.10, lines 6-13. The Association has reimbursed Folsom Ridge for costs and expenses it advanced as start-up funding for the Association and for reimbursement of construction costs related to the Caldwell crossing; however, these funds do not constitute profit or gain in any form being returned to Folsom Ridge. Hearing Exhibit 13, Prefiled Direct Testimony of William A. Hughes, p. 3, lines 17-23, p. 4, lines 1-4; Transcript p. 660, lines 6-25, p. 661, lines 1-9.

⁸⁴ Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 10, lines 6-13; Hearing Exhibit 13, Prefiled Direct Testimony of William A. Hughes, p. 2-5.

associated with the operation and maintenance of the water and sewer systems. It is estimated that there is currently \$9,000 in this account.⁸⁵

59. The Association is a non-profit entity, does not accrue profit from any of its operations, and its charges for service are not derived from a profit motive or for making a return.⁸⁶

Findings of Fact Regarding Complainants' and Other Homeowners' Relationships with the Association

60. Ms. Orler is the successor in interest to the prior owner of the home located at 3252 Big Island Drive, Roach, MO 65787, who paid tap-on fees to Folsom Ridge of \$4200 for sewer and \$2000 for water, reserving the right to tap into these systems.⁸⁷

61. On November 29, 2000, the Association mailed Ms. Orler a letter of invitation to join the Association. The letter refers to the invitation as being an additional invitation to previous invitations. The letter also extends an invitation to attend an informational meeting on December 29, 2000, and references the issues to be discussed and offers to provide copies of documents the Association will be reviewing. Those documents included revised bylaws of the Association and revised covenants and restrictions for the Association.⁸⁸

62. Ms. Orler declined the Association's invitation to join, has not signed the ratification document for the Amended and Restated Covenants and Conditions of the Association and is not a member of the Association.⁸⁹

63. Ms. Orler does not receive water or sewer service from the Association, having her own private well for drinking water and her own sanitary septic system.⁹⁰

⁸⁵ Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 4, lines 17-22, p. 10, lines 6-13; Hearing Exhibit 10, Prefiled Rebuttal Testimony of Rick Rusaw, p. 19, lines 10-14; Hearing Exhibit 13, Prefiled Direct Testimony of William A. Hughes, p. 3, lines 2-15, p. 4, lines 17-23, p. 5, lines 1-3; Hearing Exhibit 13, Prefiled Direct Testimony of William A. Hughes, Attached Balance Sheet and Statement of Revenue and Expenses. Transcript p. 567, line 25, p. 568, lines 1-6.

⁸⁶ Hearing Exhibit 13, Prefiled Direct Testimony of William A. Hughes, p. 2, lines 7-8, p. 3, lines 2-15, p. 4, lines 6-12.

⁸⁷ Cathy J. Orler's Complaint (WC-2006-0082), p. 2; Hearing Exhibit 1, Prefiled Direct Testimony of Cathy J. Orler, p. 1, lines 10-20, p. 2, lines 1-12; Hearing Exhibit No. 3, Prefiled Surrebuttal Testimony of Cathy J. Orler, p. 2, lines 10-15.

⁸⁸ Hearing Exhibit 97, Letter from the Association (Reggie Golden) to Jeffery and Cathy Litt (Orler), dated November 29, 2000.

⁸⁹ Hearing Exhibit 1, Prefiled Direct Testimony of Cathy J. Orler, p. 3, lines 14-16; Hearing Exhibit 10, Prefiled Rebuttal Testimony of Rick Rusaw, p. 14, lines 1-2; Hearing Exhibit 39, Letter to the Commission from Pamela Holstead, dated May 17, 2006, p. 1; Transcript p. 319, lines 3-6, p. 320, line 25, p. 323, lines 9-10, p. 352, lines 2-3.

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64. Ms. Orler currently pays monthly reservation/maintenance fees in the amount of \$5.00 per month to preserve her right to tap onto the water distribution system and \$5.00 per month to preserve her right to tap onto the sewer system.⁹¹

65. Mr. Pugh does not receive water service from the Association, but he does receive sewer service from the Association, having paid a tap-on fee of \$4800 to Folsom Ridge and having connected to the sewer system on November 9, 1999.⁹²

66. On November 29, 2000, the Association mailed Mr. Pugh a letter of invitation to join the Association. The letter refers to the invitation as being an additional invitation to previous invitations. The letter also extends an invitation to attend an informational meeting on December 29, 2000, and references the issues to be discussed and offers to provide copies of documents the Association will be reviewing. Those documents included revised bylaws of the Association and revised covenants and restrictions for the Association.⁹³

67. Mr. Pugh did not accept the Association's offer to join, does not consider himself to be a member of the Association and has not signed the ratification document for the Amended and Restated Covenants and Conditions of the Association.⁹⁴

⁹⁰ Hearing Exhibit 1, Prefiled Direct Testimony of Cathy J. Orler, p. 8, lines 16-19. Transcript p. 115, lines 5-9; p. 166, lines 1-3; p. 182, lines 25, p. 183, lines 1-2, p. 196, lines 19-25, p. 339, lines 19-25, p. 340, lines 1-25.

⁹¹ Hearing Exhibit 43, Invoices from the Association to Cathy J. Orler for payment of water and sewer fee ("Not Connected"), dated January 2007, April, June, August, and October of 2002. See also hearing Exhibit 76, Invoices to Jeff and Cathy Litty from the Association, dated June, July and December of 2001, April June, and August of 2002, and January of 2003. Note: "Litty" was Ms. Orler's married name and these invoices reflect different charges associated with the time periods of the billing. Transcript p. 322, lines 16-25, pp. 323-324, p. 325, lines 1-2.

⁹² Benjamin D. Pugh's Complaint (WC-2006-0090), p. 2; Hearing Exhibit 4, Prefiled Direct Testimony of Benjamin D. Pugh, p. 8, lines 12-14; Hearing Exhibit 48, Letter to Benjamin and Karen Pugh from the Association, dated April 9, 2001; Hearing Exhibit 49, Invoice from the Association to Benjamin and Karen Pugh, dated April 9, 2001; Hearing Exhibit 50, Letter to R. V. Golden from Benjamin D. Pugh, dated April 14, 2001.

⁹³ Hearing Exhibit 61, Letter from the Association (Reggie Golden) to Benjamin and Karen Pugh, dated November 29, 2000; Transcript p. 464, lines 24-25, pp. 465-466, p. 467, lines 1-20, p. 469, lines 14-17.

⁹⁴ Benjamin D. Pugh's Complaint (WC-2006-0090), p. 2; Hearing Exhibit 4, Prefiled Direct Testimony of Benjamin D. Pugh, p. 2, lines 3-5, p. 9, lines 15-22; Hearing Exhibit 39, Letter to the Commission from Pamela Holstead, dated May 17, 2006, p. 2; Hearing Exhibit 52, Letter from Charles E. McEllyea to Mr. and Mrs. Pugh, dated November 29, 2001; Transcript p. 464, lines 24-25, pp. 465-466, p. 467, lines 1-20, p. 469, lines 14-17.

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68. Mr. Pugh also declined the Association's offer to return the money he spent for the sewer tap, disconnect the sewer service and remove the tap.⁹⁵

69. In the invoice sent to Mr. Pugh on April 9, 2001, the Association identifies the sewer fees as being "Member Dues."⁹⁶

70. On November 16, 2001, the Missouri Department of Natural Resources advised Folsom Ridge that, in accordance with 10 CSR 20-6.010(3)(B)(5)(C)(IV), "everyone connected to the wastewater treatment system shall be bound by the rules of the homeowners association, and thus be a member [of the homeowner's association]."⁹⁷

71. On November 29, 2001, after receiving the DNR's November 16, 2001 letter, the Association notified Mr. Pugh that although he had not signed the acknowledgment of membership, i.e. the ratification document, he was bound by the rules and regulations of the Association since he was connected to the water and sewer system.⁹⁸

72. In the November 29, 2001 letter to Mr. Pugh, the Association, pursuant to 10 CSR 20-6.010(3)(B)(5)(C)(IV), stated that it considered Mr. Pugh to be a member by virtue of him having connected to the sewer system and being bound by the rules and regulations of the Association with regard to that connection.⁹⁹

⁹⁵ Hearing Exhibit 39, Letter to the Commission from Pamela Holstead, dated May 17, 2006, p. 2.

⁹⁶ Hearing Exhibit 49, Invoice from the Association to Benjamin and Karen Pugh, dated April 9, 2001. On April 25, 2001, the Association mailed a letter addressed solely to Benjamin and Kathy Pugh outlining different fees for members and non-members of the Association based upon whether they were connected to the water and sewer services. Hearing Exhibit 62, Letter from Reggie Golden, the Association, to Benjamin and Karen Pugh, dated April 25, 2001. There is no evidence in the record to clarify if this letter was sent to Mr. Pugh because of his disputed membership status with the Association, or if these stated rates were actually charged to any alleged non-members of the Association. *Id.* Mr. Pugh is not identified as being a "nonmember" of the Association, and in fact, his membership status is not address at all in this letter. *Id.* The billing statements sent to Mr. Pugh that are part of this record and identify his monthly charges as being "Member Dues." See Footnote 96, *supra*. As the remainder of the FOFs reveal, there is no evidence in the record establishing that any nonmember, or any other individual contesting membership status such as Mr. Pugh, has hooked up to the system, received service from Folsom Ridge or the Association, or was billed by Folsom Ridge or the Association.

⁹⁷ Hearing Exhibit 54, Letter from Kristine Ricketts, Regional Director of the DNR to Mr. Reggie Golden, dated November 16, 2001.

⁹⁸ Hearing Exhibit 52, Letter from Charles E. McElyea to Mr. and Mrs. Pugh, dated November 29, 2001.

⁹⁹ Hearing Exhibit 52, Letter from Charles E. McElyea to Mr. and Mrs. Pugh, dated November 29, 2001; Transcript p. 633, lines 15-25, p. 634, lines 1-12.

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73. The Association considers Mr. Pugh to be a member and he has full voting rights with the Association.¹⁰⁰

74. Mr. Pugh acknowledges that the Association treats him as being a member.¹⁰¹

75. Ms. Fortney is the successor in interest to the prior owners of her home, Richard and Carol Hirsch, who paid a tap-on fee to Folsom Ridge of \$4200 for sewer service, reserving the right to tap into this system.¹⁰²

76. Ms. Fortney paid a \$14.00 Association membership fee as part of the purchase agreement when she closed on the purchase of her home from the Hirschs; however, she does not consider herself to be a member of the Association.¹⁰³

77. Ms. Fortney was invited to join the Association but declined to accept that offer, feeling that attempts to get her to join amounted to intimidation and coercion.¹⁰⁴

78. Ms. Fortney does not receive water or sewer service from the Association, having her own private source of drinking water and her own sanitary septic system.¹⁰⁵

79. Mr. Temares appeared at hearing and cross examined several witnesses. However, Mr. Temares did not offer any testimony or documentary evidence and was not cross examined. Consequently, the Commission can make no factual findings regarding the allegations Mr. Temares's has made in his complaint -- either to support or refute them. He has not established that he has legally protectible interest that would be affected by a decision made by the Commission.¹⁰⁶

¹⁰⁰ Hearing Exhibit 10, Prefiled Rebuttal Testimony of Rick Rusaw, p. 25, line 1; Transcript p. 633, lines 15-25, p. 634, lines 1-12.

¹⁰¹ Transcript p. 465, lines 11-22.

¹⁰² Cindy Fortney's Complaint (WC-2006-0138), p. 2; Transcript p. 500, lines 10-17, p. 501, lines 24-25, p. 502, lines 1-3.

¹⁰³ Cindy Fortney's Complaint (WC-2006-0138), p. 2; Hearing Exhibit 74, Closing Document for the Purchase of the Home at 3298 Big Island Drive, Roach, MO 65787, dated July 14, 2005; Transcript p. 502, lines 24-25, p. 503, lines 1-19.

¹⁰⁴ Transcript p. 503, lines 1-11.

¹⁰⁵ Cindy Fortney's Complaint (WC-2006-0138), p. 2; Transcript p. 490, lines 19-20, p. 498, lines 16-17, p. 500, lines 6-9, p. 503, lines 22-25

¹⁰⁶ While it is not evidence, the commission can glean from Mr. Temares's complaint that he is connected to the Association's water and sewer systems and does receive water and sewer service from the Association. He implies that he is a member of the Association, but states he became aware of this fact after he purchased his home. See Complaint filed in Case No. WC-2006-0120, p. 2. None of Mr. Temares's allegations can be established due to his failure to introduce any evidence.

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80. Phillip Hiley, a witness, but not a complainant in this matter, testified that he did not consider himself to be a member of the Association because he did not ratify the Association's bylaws, but that he pays monthly fees for "someone now hooked on" to the system.¹⁰⁷

81. Mr. Hiley testified that he did not believe that joining the Association made any difference one way or the other.¹⁰⁸

82. Mr. Hiley also testified that he attended the Association's meeting concerning the transfer of assets to the Chapter 393 Companies and that he "probably" voted at that meeting.¹⁰⁹

83. There is no evidence in the record to clarify if Mr. Hiley is "hooked on" to either the water or sewer service, or if he was referring to having paid "tap-on" fees and/or monthly reservation/maintenance fees.

Findings of Fact Related to the Safe and Adequate Provision of Services

84. Folsom Ridge hired Lake Professional Engineering Services Inc. ("LPES") to design the first phase of the water and sewer systems.¹¹⁰

85. On August 7, 1998, the DNR received the Association's Application for Construction or Operating Permit for Facilities which Receive Basically Domestic Waste.¹¹¹

86. LPES submitted detailed plans, specifications, an engineering report and an application for a construction permit for the water distribution system and wastewater disposal facility to DNR on September 30, 1998, and on November 4, 1998, DNR advised the Association and LPES that approval of the project was pending on the results of a review by a private consultant.¹¹² The plans called for a system designed to provide water and sewer service for 80 lots.¹¹³

87. Folsom Ridge/LPES began construction of the water and sewer lines without the required permit in 1998, and the DNR sent a letter to the Association on November 19, 1998 instructing the Association to stop

¹⁰⁷ Transcript p. 996, lines 20-25, p. 997, lines 1-22.

¹⁰⁸ Transcript p. 997, lines 9-13.

¹⁰⁹ Transcript p. 997, line 15.

¹¹⁰ Transcript, p. 93, lines 12-20, p. 639, lines 18-25; p. 765, lines 3-4, p. 771, lines 11-19, p. 941, lines 9-12.

¹¹¹ Hearing Exhibit 83, construction permit application for wastewater treatment plant, signed by David Lees on June 11, 1998.

¹¹² Hearing Exhibit 78, Letter from DNR (Breck E. Summerford) to David Lees (Association) dated November 4, 1998.

¹¹³ *Id.* Letter from James O. Jackson, LPES, to Steve Jones, DNR, dated September 30, 1998; Construction Permit Application, dated September 24, 1998. See also Hearing Exhibit 87, Draft copy of DNR's Missouri State Operating Permit.

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construction until a construction permit was issued. No Notice of Violation was issued in conjunction with the stop construction letter.¹¹⁴

88. According to the DNR, it is common practice for contractors to begin construction of water and sewer systems prior to having received their construction permits, and it is common for the DNR to issue stop orders to allow the permitting process to be completed prior to allowing resumption of construction.¹¹⁵

89. On November 22, 1998, LPES sent a letter to the DNR advising the agency that it had immediately halted construction, and apologized explaining that it had begun construction early to take advantage of good weather. LPES waited for the permit process to become finalized before resuming construction.¹¹⁶

90. The November 22, 1998 letter also advised the DNR that due to various geographical features and dictates from the Camden County Road Department, LPES was revising its construction plans to place the water and sewer mains in the same trench. The letter requested approval of the revised plans.¹¹⁷

91. On December 18, 1998, The DNR issued approval of the Association's submission of the engineering report, plans and specifications for a new community public water supply storage facility and distribution system, pursuant to Public Drinking Water Program Review Number 31182-98.¹¹⁸

92. Also on December 18, 1998, the Missouri Public Drinking Water Program requested the Association to provide detailed drawings of the trench to match the revised specifications showing the earthen shelf upon which the water line was replaced, and those drawings were provided.¹¹⁹

¹¹⁴ Hearing Exhibit 60, p. 2, Letter from Breck E. Summerford of the Permit Section of DNR to James O. Jackson of Lake Professional Engineering Service, Inc. ("LPES"), working for the Association, dated November 19, 1998; Transcript, p. 767, lines 20-25, p. 768, lines 1-19.

¹¹⁵ Transcript, p. 851, lines 7-25, p. 852, lines 1-9.

¹¹⁶ Hearing Exhibit 60, p. 3 Letter from James O. Jackson of LPES to Breck E. Summerford of the DNR, dated November 22, 1998; Hearing Exhibit 78, Letter from James O. Jackson of LPES to Breck E. Summerford of the DNR, dated November 22, 1998.

¹¹⁷ *Id.*

¹¹⁸ Hearing Exhibit 91, DNR cover letter dated April 23, 2004 and attached Settlement Agreement, p. 2.

¹¹⁹ *Id.*

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93. On January 5, 1999, DNR issued the Association a construction permit for its wastewater system, Permit # 26-3081, to serve eighty homes in Big Island.¹²⁰

94. Design guidelines for trench excavation for the placement of water and sewer mains, *inter alia*, provided that: "Whenever possible, the water mains shall be laid ten feet (10') horizontally from any existing or proposed drain or sewer line. Should conditions prevent a lateral separation for ten feet (10'), water mains may be laid closer than ten feet (10') to a storm or sanitary sewer, provided the water main is laid in a separate trench, or on an undisturbed earth shelf located on one side of the sewer at such an elevation that the bottom of the water main is at least eighteen (18") inches above the top of the sewer. When it is impossible to obtain the proper horizontal or vertical clearance as stipulated above, both the water and sewer line shall be constructed of a full twenty foot (20') length of pipe crossing in the middle and shall be pressure tested to assure watertightness before backfilling."¹²¹

95. Design guidelines utilized by the DNR for water and sewer systems are not codified in state statutes or the Code of State Regulations.¹²²

96. The design guidelines are based on the "Ten-State Standards" document, which was created by ten states, including Missouri, setting out guidance criteria for the construction of potable water and wastewater systems.¹²³

97. DNR enforcement of design guidelines is limited to cooperative efforts with persons constructing the systems, approval of construction and operating permits, and issuing notices of violation should an actual violation of water quality standards occur as a result of not following the design guidelines.¹²⁴

98. Folsom Ridge received a notice of violation from the DNR, dated May 24, 1999, (Notice of Violation Number 1315JC) for having begun construction of water and sewer mains without a permit pursuant to 10 CSR 20-6.010(1)(A) and 4(A), and 10 CSR 60-3.010(1)(A). The cover letter to

¹²⁰ Hearing Exhibit 86, Letter from Robert H. Hentges, DNR, to the Association and accompanying permit, date January 5, 1999; Hearing Exhibit 89, Letter from Robert H. Hentges, DNR, to the Association and accompanying permit, date January 5, 1999.

¹²¹ Hearing Exhibit 89, Article B, Trench Excavation, paragraph B.1-3, Horizontal Separation of Water and Sewer Mains.

¹²² Transcript, p. 760, lines 17-25, p. 761, lines 1-2, p. 765, lines 23-25, p. 766, lines 1-25, p. 767, lines 1-3.

¹²³ Transcript, p. 766, lines 1-16.

¹²⁴ Transcript, p. 766, lines 17-25, p. 767, lines 1-19.

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the notice of violation states that the violation is in relation to the lines not being constructed in accordance with approved plans. Specifically, one inch service lines are required for each home and Folsom Ridge was using one line to serve up to three homes.¹²⁵

99. On October 9, 1999, LPES submitted to the DNR's Division of Environmental Quality its Certification of Work Completed, representing that based upon periodic inspections the wastewater facilities were completed in accordance with the plans and specifications submitted to DNR with the deviation of having placed the water and sewer lines in the same trench because of narrow roads and solid rock in the construction site.¹²⁶

100. On February 23, 2000, the DNR issued its Report of Final Inspection and Approval of Public Water Supply for Big Island Subdivision. The report stated that complete water facilities, so far as could be determined, had been constructed essentially in accordance with the approved plans. This report indicates that any issues concerning the May 24, 2000 violation, Violation Number 1315JC, had been resolved. The report also notes that DNR reserved the right to require alterations should the system later be found to be in noncompliance.¹²⁷

101. On February 25, 2000, DNR issued the Association its State Operating permit, Missouri Permit # MO-123013, to discharge from Big Island, i.e. its wastewater treatment facility operating permit, replacing all previous permits.¹²⁸

¹²⁵ Hearing Exhibit 59, Certified Letter from Stephen P. Jones Environmental Engineer for the DNR to Mr. David Lee; and DNR Notice of Violation Number 1315, dated May 24, 1999.

¹²⁶ Hearing Exhibit 90, DNR Missouri State Operating Permit and attached Certification of Work Completed report, dated October 9, 1999.

¹²⁷ Hearing Exhibit 90, DNR Missouri State Operating Permit and attached Report of Final Inspection and Approval of Public Water Supply; Hearing Exhibit 91, DNR cover letter dated April 23, 2004 and attached Settlement Agreement, p. 2.

¹²⁸ Hearing Exhibit 84, Letter from Philip A. Schroeder, DNR to the Association, dated February 25, 2000, plus attached permit # MO-123013. It should be noted that on January 24, 2000, just prior to receiving its final approval on the original construction phase of the water and sewer system, LPES filed an application for a construction permit for a water line extension with the DNR, including plans, calculations, layout map, an engineers report, plans and specifications to extend the water system to serve the remainder of their lots. Approval of the permit request was granted on March 6, 2000. On March 7, 2000, the DNR issued its Report on engineering Report, Plans and Specifications for Waterline Extension, approving the plans submitted on January 24, 2000, by LPES. On June 23, 2000, the DNR issued the Association a construction permit authorizing the construction of septic tanks to serve 39 lots in Big Island West Subdivision. This water line extension proceeded without alteration of plans and without any DNR violations. See *Hearing Exhibit 79, Letter from James O. Jackson, LPES, to Keith Forck, DNR, plus attachment, dated January 24, 2000; Hearing Exhibit 80, Letter from Breck E. Summerford, DNR, to David Lees, Association, dated March 7, 2000, DNR Report and grant of*

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102. Effluent limitation and monitoring requirements were outlined in the February 25, 2000 permit, allowing for a daily maximum Fecal Coliform discharge of 1000/100mL daily and 400/100mL monthly average; applicable only during the recreational season from April 1 through October 31.¹²⁹

103. In early 2001, there was an incident involving the wastewater treatment plant that came to be called the "Stoyer's Spring" incident.¹³⁰

- a. It was discovered that at the same time when the discharge line from the wastewater treatment line was installed, the contractor installed an electric control panel to operate the plant;
- b. during the installation of the control panel a stake was driven down through the discharge line;
- c. a rubber coupling was cut in half, placed around the pipe, and attached with stainless steel clamps in attempt to repair the damage to the discharge line;
- d. the coupling was three inches in diameter, while the pipe was four inches in diameter;
- e. the faulty repair left a leak on the bottom side of the pipe, and the sewer effluent leaking from this pipe joined with a natural spring resulting in the combination of ground water and sewer leakage that traveled down hill to an area near Mr. Duane Stoyer's home;
- f. due to the difficulty with locating the leak, that was hidden on the bottom of the pipe, it took approximately 76 days to locate and stop the leak from the wastewater discharge line.¹³¹

104. There is no evidence in the record that the Stoyer Springs leak resulted in any instances of violation of water quality standards, or any contamination of the drinking water provided by the water distribution system.

105. There is no evidence in the record that the DNR, or any local or county agency issued any type of notice of violation, or documented any health violation of any type in association with the Stoyer Springs leak.¹³²

construction permit, dated March 6, 2000, Application form for construction permit, dated January 24, 2000, Letter from Breck E. Summerford, DNR, to David Lees, Association, dated February 18, 2000: Hearing Exhibit 85, Construction Permit and accompanying letter from Robert H. Hentges, DNR.

¹²⁹ Hearing Exhibit 84, Effluent Limitations and Monitoring Requirements, attached to operating permit # MO-123013.

¹³⁰ Transcript p. 712, lines 23-24.

¹³¹ Transcript, p. 675, lines 24-25, pp. 676-678, p. 698, lines 15-25, p. 699, lines 1-21, p. 711, lines 18-25, pp. 712-713, p. 714, lines 1-19, p. 828, lines 23-25, p. 829, lines 1-6.

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106. The water quality from the discharge pipe, the source of the leak for the Stoyer Springs incident, complies with DNR standards for effluent that is discharged into the Lake of the Ozarks.¹³³

107. On August 8, 2003, the DNR issued a Notice of Violation citing Folsom Ridge for a violation of the terms of Permit MO-123013. This violation was related to the placement of the water and wastewater collection and distribution lines.¹³⁴

108. On January 12, 2004, in follow-up to the August 8, 2003 Notice of Violation, DNR inspected the water and wastewater collection and distribution lines on Big Island and found these lines were placed in the same trench without proper separation of the lines. Specifically, the water distribution lines were not placed on an undisturbed earthen shelf as stated in the "as-built" drawing and were not constructed in accordance with approved plans.¹³⁵

109. Failure to construct the water and wastewater collection and distribution lines in accordance with approved plans resulted in violations of Missouri's Clean Water Law, Section 644.076.1 and 10 CSR 20-8.120(11)(C)(1), and Missouri's Safe Drinking Water law, Section 640.115.2 and 10 CSR 3.010(1), and the record reflects that the DNR promptly entered into a settlement agreement with Folsom Ridge to resolve these violations.¹³⁶

¹³² Michael McDuffy, of Lake Ozark Water and Sewer L.L.C. ("LOWS") is under contract for the operation and maintenance of the water distribution and waste water treatment facilities. (Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, p. 15, lines 1-9; Hearing Exhibit 17, Prefiled Direct Testimony of Michael T. McDuffey, p. 2, lines 8-13.) On April 23, 2001, a report from the McDuffey Lab indicated that there was one test of the Stoyer/Pewe facility revealing a Fecal Coliform Analysis demonstrating 10,909 fecal colonies per 100 ml of sample water. (Hearing Exhibit 64, McDuffey Lab Report dated April 23, 2001.) This sample was brought in for testing by Mr. Stoyer and was represented to be from his property. (Transcript, p. 676, line 10-12.) Mr. McDuffey testified that this level of fecal colonies was indicative of normal groundwater, not active wastewater that would register in the millions or have numbers too numerous to count. (Transcript p. 675, lines 24-25, p. 676, lines 1-25, p. 677, lines 1-10.) Mr. McDuffey further testified that treated wastewater from the facility is restricted to 400 fecal colonies per 100 ml sample of water. (*Id.*)

¹³³ Transcript, p. 733, lines 7-25, p. 734, lines 1-3.

¹³⁴ Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, p. 10, lines 4-5.

¹³⁵ Hearing Exhibit 91, DNR cover letter dated April 23, 2004 and attached Settlement Agreement, p. 3; Transcript, p. 762, lines 6-16.

¹³⁶ Hearing Exhibit 91, DNR cover letter dated April 23, 2004 and attached Settlement Agreement, p. 3. Folsom Ridge maintains that its prior member, Mr. David Lees, was the managing partner and the "on-ground" site managing partner. Mr. Lees left in April of 2001 related to problems with him managing the development, including overseeing and managing the original installation of the water and sewer mains, which turned out to be in violation of DNR regulations. Folsom Ridge has brought suit against Mr. Lees in Federal Court seeking

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110. On April 26, 2004, a Settlement Agreement was fully executed between Folsom Ridge, the Missouri Attorney General's Office (AGO") and DNR to resolve the violations discovered during the January 12, 2004 inspection.¹³⁷

111. The Settlement Agreement required, *inter alia*, that Folsom Ridge:

- a. pay a civil penalty of \$8000.00;
- b. submit an engineering report, plans and specifications identifying the corrections to be made to the water distribution system;
- c. complete modification of the water distribution system to bring it into compliance with the approved plans and specifications approved by DNR;
- d. arrange periodic inspections with DNR during the reconstruction of the water distribution system;
- e. resolve any conflicts with placement and/or the alignment between water and wastewater piping with the DNR and refrain from covering such resolutions with fill material until inspected by DNR;
- f. and, obtain a final construction inspection and approval from DNR to completely satisfy the terms of the Settlement Agreement.¹³⁸

112. Krehbiel Engineering was involved with the relocation of the water main and the design of extensions and improvements to the system.¹³⁹

113. On September 22, 2004, DNR closed the file in relation to Big Island's violation and the Settlement Agreement.¹⁴⁰

indemnification for the costs associated with correcting the improperly installed water and sewer lines. Transcript p. 562, lines 19-25; p. 563, lines 1-25, p. 629, lines 18-19. Hearing Exhibit 10, Prefiled Rebuttal testimony of Rick Rusaw, p. 7, lines 4-19, p. 17, lines 1-6, p. 27, lines 8-11; Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, p. 12, lines 13-23, p. 13, lines 1-12.

¹³⁷ Hearing Exhibit 91, DNR cover letter dated April 23, 2004 and attached Settlement Agreement.

¹³⁸ *Id.*

¹³⁹ Hearing Exhibit 14, Prefiled Direct Testimony of David Krehbiel, p. 4, lines 1-25, p. 5, lines 1-18; Transcript p. 93, lines 16-19.

¹⁴⁰ Hearing Exhibit 92, Memorandum from Joseph P. Bindbeutel, AGO to Elena Seon, DNR

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114. On October 21, 2004, DNR issued its Report on Plans, Specifications and an Engineering Report for Waterline Replacement and Extension to Folsom Ridge approving the engineering plans and specifications for the waterline replacement and extension and issuing a construction permit.¹⁴¹

115. By the end of 2004, all corrections had been made with the waterline replacement.¹⁴²

116. On September 6, 2005, Krehbiel Engineering, Inc. submitted an Application for Water Main Extension Final Construction Approval to DNR.¹⁴³

117. On September 22, 2005, DNR sent a letter and report approving the engineering report regarding the application for a waterline extension to serve 12 potential users for the Big Island Subdivision.¹⁴⁴

118. On September 29, 2005, the DNR mailed its report of final inspection to Folsom Ridge granting its final and unconditional approval of the Big Island Subdivision waterline replacement and extension. DNR's final approval includes all variances that were made in the plans for installation that occurred during the waterline replacement and extension.¹⁴⁵

¹⁴¹ Transcript p. 951, lines 7-13; Hearing Exhibit 116, Letter from Breck E. Summerford, DNR, to Reggie Golden, Folsom Ridge, dated October 21, 2004, plus attached report. The October 21, 2004 report states that it is anticipated that the service lines connecting the mains to a number of homes will share a common 1-inch PVC line under the roadway and that technically such lines are part of the water distribution system and subject to the separation of water and sewer line construction policy. *Id.* Despite the notation in the October 21, 2004 report referencing service lines, John MacEachen, the Enforcement Unit Chief for the public drinking water branch of the DNR testified that the service lines and service connection lines do not fall under the jurisdiction of the DNR, but rather are regulated by local ordinance. See Transcript, p. 775, lines 6-25, p. 776, lines 1-25, p. 777, lines 1-13. The Commission notes that the issue concerning DNR's jurisdiction, or lack of jurisdiction over the service lines and service connection lines is irrelevant to the issues requiring determination by the Commission.

¹⁴² Transcript, p. 762, lines 6-16.

¹⁴³ Hearing Exhibit 81, Letter and attached application from David Krehbiel of Krehbiel Engineering, Inc. to Cynthia Davies, DNR, dated September 6, 2005.

¹⁴⁴ Hearing Exhibit 82, Letter from Breck E. Summerford, DNR, to Reggie Golden, Folsom Ridge, dated September 22, 2005, plus attached documents.

¹⁴⁵ Hearing Exhibit 93, Letter and Report from DNR signed by Clinton J. Finn, address to Reggie Golden, dated September 29, 2005. Prior to final approval, DNR had provided Folsom Ridge with reports of its construction inspections identifying areas requiring further correction for the water line replacement and extension and for appropriate water testing. (Hearing Exhibit 68, Letter from DNR, Cynthia S. Davies, to Reggie Golden, dated March 18, 2005; Hearing Exhibit 70, Letter from DNR, Cynthia S. Davies, to Reggie Golden, dated June 28, 2005.) Additionally, on June 28, 2005, DNR issued a Notice of Violation (Notice of Violation Number 11210SW) for violations of Section 640.115.2 and 10 CSR 60-3.010(1)(A), for having begun construction of the extension of the waterline without written authorization. (Hearing

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119. On February 15, 2006, the DNR mailed its report of final inspection to Folsom Ridge granting its final and unconditional approval of a waterline extension serving 12 additional lots; Public Water Supply Number 30-31265.¹⁴⁶

120. As required by the terms of the settlement agreement between DNR and Folsom Ridge, all fines have been paid by Folsom Ridge in connection with any DNR Notice of Violation and any kind of unsatisfactory feature in relation to the water and sewer facilities.¹⁴⁷

121. Folsom Ridge fully cooperated with the DNR in rectifying the problems requiring reinstallation of its water main on Big Island.¹⁴⁸

122. There are no other DNR Notices of Violation pending regarding Folsom Ridge or the Association's ownership or operation and maintenance of the water and sewer systems on Big Island.¹⁴⁹

123. There are no outstanding DNR enforcement actions regarding the Folsom Ridge or the Association's ownership or operation and maintenance of the water and sewer systems on Big Island.¹⁵⁰

124. Folsom Ridge and the Association are in complete compliance with monitoring reports, contaminant requirements and maximum contaminant levels with regard to their water and sewer systems on Big Island.¹⁵¹

125. There is no evidence in the record that the original installation of the water and sewer mains, lacking the appropriate horizontal and/or vertical separation, resulted in any instances of violation of water quality standards, or any contamination of the drinking water provided by the system.

126. The drinking water system has passed all DNR standards.¹⁵²

Exhibit 69, Letter from DNR, including Schedule of Compliance, Cynthia S. Davies, to Reggie Golden, dated June 28, 2005.) The DNR's final approval, however, was unconditional and consequently, the previously identified deficiencies and violation were considered to be resolved. (Hearing Exhibit 77, Letter and Report from DNR signed by Clinton J. Finn, address to Reggie Golden, dated September 29, 2005); Hearing Exhibit 15, Prefiled Rebuttal Testimony of David Krehbiel, p. 2, lines 4-20; Transcripts pp. 946-953, p. 1218, lines 22-25, p. 1219, lines 1-5.

¹⁴⁶ Hearing Exhibit 94, Letter from Cynthia S. Davies, DNR, to Reggie Golden, and accompanying Report of Final Inspection of Public Water Supply Improvements, dated February 15, 2006

¹⁴⁷ Transcript, p. 862, lines 17-25, p. 863, line 1, p. 866, lines 4-25, p. 867, lines 1-9.

¹⁴⁸ Transcript, p. 851, lines 7-25, p. 852, lines 1-14, p. 866, lines 24-25, p. 867, lines 1-9.

¹⁴⁹ Transcript, p. 863, lines 2-5.

¹⁵⁰ *Id.*

¹⁵¹ Transcript, p. 865, lines 8-25, p. 866, lines 1-3.

¹⁵² Transcript p. 730, lines 1-6.

127. The wastewater treatment plant has not received a bad discharge report.¹⁵³

128. The DNR has held the issuance of the operating permit, or a permit to dispense, for the water and sewer system on Big Island pending the determination of ownership of the facilities, i.e. pending the results of this litigation. The DNR does not consider the lack of an operating permit, or a permit to dispense, under these circumstances to be a violation of any state statutes or regulations that would require an enforcement action.¹⁵⁴

Findings of Fact Related to the Transfer of Assets

129. Big Island Sewer Company was organized pursuant to the provisions of Sections 393.825 through 393.861.¹⁵⁵

130. Big Island Water Company was organized pursuant to the provisions of Sections 393.900 through 393.951.¹⁵⁶

131. Both companies were organized in October 2006 for the purpose of eventually receiving the water and sewer assets on Big Island that are currently owned by Folsom Ridge, and managed and operated by the Association.¹⁵⁷

132. As currently organized, both of these companies comply with the provisions of Chapter 393, and as such, are considered to be nonprofit companies as defined and regulated pursuant to Chapter 393.¹⁵⁸

133. Chapter 393 non-profit companies are expressly excluded from the jurisdiction of the Missouri Public Service Commission.¹⁵⁹

134. Folsom Ridge and the Association are listed as being the "Sellers" and the Big Island Sewer Company and the Big Island Water

¹⁵³ *Id.*

¹⁵⁴ Transcript, p. 898, lines 15-25, pp. 899-901, p. 902, lines 1-7.

¹⁵⁵ Hearing Exhibit 20, Joint Application for Approval of Transfer of Assets to Nonprofit Companies Organized Under Chapter 393, RSMo, p. 4, paragraph 9; Hearing Exhibit 98, Prefiled Direct Testimony of Gail Snyder, p. 1, lines 4-5; Hearing Exhibit 99, Prefiled Additional Direct Testimony of Gail Snyder, p. 1, lines 4-5.

¹⁵⁶ *Id.*

¹⁵⁷ Hearing Exhibit 98, Prefiled Direct Testimony of Gail Snyder, p. 1, lines 10-12; Hearing Exhibit 99, Prefiled Additional Direct Testimony of Gail Snyder, p. 1, lines 10-18.

¹⁵⁸ Hearing Exhibit 20 Joint Application for Approval of Transfer of Assets to Nonprofit Companies Organized Under Chapter 393, RSMo; Hearing Exhibit 101, Bylaws of the Chapter 393 Companies; Chapter 393, RSMo 2000 and 2006 Cum. Supp.

¹⁵⁹ Sections 393.847.2 and 393.933.2; Transcript p. 1050, lines 10-11.

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Company (collectively “Chapter 393 Companies”) are listed as the “Buyers” in an agreement to transfer the water and sewer systems on Big Island.¹⁶⁰

135. Folsom Ridge and the Association will have no affiliation with the Chapter 393 Companies.¹⁶¹

136. Under the transfer agreement, Folsom Ridge and the Association will join in transferring their interests to all of the assets used or useful in the provision of water distribution services and wastewater collection and treatment, including the real estate and easements in or on which the facilities are located. The assets will include facilities now under construction for expansion of the system. All accounts, accounts receivable and reserve accounts, if any, related to the provision of water and sewer service will be transferred as well.¹⁶²

137. Folsom Ridge and the Association will transfer the assets without charge to the 393 Companies. However, a portion of tap permit fees collected by the 393 Companies from certain homeowners or their successors in title over the next 10 years will be paid to Folsom Ridge.¹⁶³

138. The Association has a reserve account for purposes of defraying or covering costs of unexpected equipment or material needs or other unanticipated expenses in the operation and maintenance of the system. At the time of hearing, the balance in that account was approximately \$7,000.00. It will be transferred to the 393 Companies.¹⁶⁴

139. Bylaws for the Chapter 393 Companies have been drafted, but, at the time of hearing, were not in final form and were subject to approval by the Board of Directors.¹⁶⁵

140. The Bylaws for the Chapter 393 Companies, as they are currently drafted, follow a one-vote-per-customer rule.¹⁶⁶

141. Residents who have paid the tap fees for connection to the water and sewer systems but who have not yet connected are still guaranteed the right to connect. That obligation is expressed in the bylaws

¹⁶⁰ Hearing Exhibit 20, Joint Application for Approval of Transfer of Assets to Nonprofit Companies Organized Under Chapter 393, RSMo, Appendix 1, p. 1; Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 2, lines 1-8, p. 3, lines 8-14.

¹⁶¹ Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 2, lines 15-20.

¹⁶² *Id.* at p. 3, lines 16-23, p. 4, lines 1-15.

¹⁶³ *Id.* at p. 5, lines 1-11.

¹⁶⁴ *Id.* at p. 4, lines 17-22.

¹⁶⁵ Hearing Exhibit 99, Additional Prefiled Direct Testimony of Gail Snyder, p. 2, lines 6-9; Hearing Exhibit 101, Bylaws of the Chapter 393 Companies; Transcript p. 1050, lines 19-24.

¹⁶⁶ Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 2, lines 15-20; Hearing Exhibit 101, Bylaws of the Chapter 393 Companies, Sewer Bylaws, p. 30, paragraph 10.2, Water Bylaws, Article XII – Voting Rights, p. 1-2.

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of each company.¹⁶⁷

142. The asset transfer will not close unless the 393 Companies have acquired the necessary permits or other approvals from the Missouri Department of Natural Resources.¹⁶⁸

143. After the transfer to the Chapter 393 Companies, operation and maintenance of the system will be the responsibility of Mr. Michael T. McDuffey's firm, Lake Ozark Water and Sewer LLC (LOWS). This company operates and maintains the systems already. Mr. McDuffey's organization will also do the billing for the 393 Companies.¹⁶⁹

144. Pursuant to written notice, the membership of the Association adopted a resolution to transfer the assets as proposed in the Application. The vote taken by the Association can be broken down as follows: There are 60 customers connected to the wastewater system and 49 customers connected to the water distribution system. Of the customers connected to the systems, 50 voted in favor of the resolution (83%) and 5 voted against it. There are 92 total customers that are billed by the Association; of those customers, 70 voted in favor of the resolution (76%) and 13 voted against it. Of the 105 total property owners on Big Island, 73 voted in favor of the resolution (69%) and 16 owners voted against it.¹⁷⁰

145. The Staff of the Missouri Public Service Commission has recommended that should the Commission determine that it has jurisdiction over these matters, it grant approval of the transfer of assets without condition. Staff has outlined a number of technical considerations that it believes the Chapter 393 Companies should address, but most of these conditions have already been addressed in Respondents' testimony and in the bylaws of the Chapter 393 Companies.¹⁷¹

¹⁶⁷ Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 5, lines 13-19; Hearing Exhibit 99, Additional Prefiled Direct Testimony of Gail Snyder, p. 2, lines 2-4; Hearing Exhibit 101, Bylaws of the Chapter 393 Companies, Sewer Bylaws, p. 10, paragraph 4.6 and Exhibit B, Water Bylaws, p. 11, Article XII and p. 19, Exhibit B.

¹⁶⁸ Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 7, lines 1-5.

¹⁶⁹ Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 7, lines 7-14; Hearing Exhibit 99, Additional Prefiled Direct Testimony of Gail Snyder, p. 3, lines 3-16.

¹⁷⁰ Hearing Exhibit 9, Prefiled Direct Testimony of Rick Rusaw, p. 7, lines 21-23, p. 8, lines 1-29, p. 9, lines 1-5; Hearing Exhibit 99, Additional Prefiled Direct Testimony of Gail Snyder, p. 4, lines 5-16.

¹⁷¹ Hearing Exhibit 104, Prefiled Rebuttal Testimony of James A. Merciel, Jr., pp. 3-6; Hearing Exhibit 104, Prefiled Rebuttal Testimony of James A. Merciel, Jr., Attachment Rebuttal Testimony of Martin L. Hummel in Case No. WA-2006-0480 (dismissed). Transcript pp. 1070-1093; Hearing Exhibit 101, By-Laws of Big Island Water Company and Big Island Sewer Company. Most of these conditions have already been addressed. *Id.* These considerations include:

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- Define water service line, service connection, water main and point-of-delivery. The "main" definition must include any pipe that has flow for more than one customer, regardless of size, including service connections that serve two customers. The service connection pipe under the road going to a lot should be part of the service connection, operated and maintained by the utility. Also, define the collecting sewers, and service sewers, including any service sewers serving more than one customer. As this is a pressure sewer system requiring pump units and septic tanks at each residence, specifications of required pump units and septic tanks along with maintenance responsibility needs to be prescribed. Much of this definition work can be modeled after the W/S Department's example tariff rules.
 - Produce "as-built" drawings showing the location, size, and appurtenances of both the water system and the sewer system. This should include locations of "service connections," "service sewers" and small diameter pipe that serve more than one home. Some of this may need to be addressed as part of daily operation, such as, adding the location of a section of pipe to "as-built drawings" when exposed during a maintenance excavation. (Already addressed)
 - There will be leaks on both systems, water and sewer, both of which are under pressure. How will the operator know when they occur, and what is to be the response? The leaks will vary from small leaks near shutoff valves possibly on the customer's side, to a large sewer or water leak or break, saturating the soil around the pipeline and perhaps flowing directly to the lake. Flow measurement capability on the wastewater system must be provided. Pressure monitoring/recording on the wastewater system should be considered. (Respondents stipulated to the installation of appropriate shut-off valves, Transcript p. 1083, lines 19-25, p. 1084, lines 1-7).
 - Water meters should be installed for all new customers, and a meter installation program should be undertaken for existing customers. This system is big enough with the potential of too many excess water use problems to operate efficiently and equitably without meters and on a flat monthly rate indefinitely. Examples of problems are: excess use for lawn watering, leaving water run to prevent freezing of an exposed waterline to a boat dock or in a house that is vacant in winter, filling swimming pools or simply leaving a plumbing fixture leaking. To the extent that any excess drinking water goes to the sewer it also results in additional wastewater treatment costs.
 - Establish a water main repair procedure and evaluate the main for the installation of isolation valves, air release valves and flush valves. The valving should be established that enables an efficient repair while limiting the time and number of customers out of service. (Already addressed)
 - All sewer customers must have a septic tank and an effluent pump. The responsible party for installation, construction inspection, operation, repair, electric power, operational inspections and solids hauling must be designated. It is recommended that the utility be responsible for tank/pump standards, inspections, repair/replacement of pump, and solids hauling. Solids hauling should be based on annual tank inspections, not on a set time period. (Already addressed)
 - Establish a written tapping procedure to be provided to plumbers making connections. Instructions should clearly state that both water and sewer are the same type and size, and address locating the correct main. If there are any portions of the main that were laid curved and therefore under stress, an appropriate cautionary statement should be included.
 - Additional storage capacity is needed on the water system. It is the Staff's understanding that a new standpipe has been planned and the construction permit issued with construction expected in the spring of 2007. (Already approved – construction expected to start in the spring of 2007).

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146. The Chapter 393 Companies have recommended, that should the Commission determine that it has jurisdiction over these matters, it grant approval of the transfer of assets subject to one condition. The Chapter 393 Companies believe that transfer should be conditioned upon requiring Folsom Ridge to transfer reserve funding amounts in harmony with the DNR's standards outlines in its financial capacity assessment guidelines.¹⁷²

147. The transfer of assets to the Chapter 393 Companies is in the public interest because:

- a. all assets are being transferred, including all accounts, accounts receivable and reserve accounts;
- b. the assets are being transferred without charge;
- c. the interests of people paying for the future right to tap-on to the system are protected;
- d. future development and extensions of the system will be done at the developer's cost pursuant to extension agreements;
- e. the current management company for the utilities, LOWS, will remain in place and has the experience, qualifications and track record with managing the systems that have kept the systems free from bad water quality reports or bad wastewater discharge reports;
- f. the 393 Companies will have the technical, financial and managerial resources and ability to develop, operate and maintain the water and sewer systems;
- g. The water distribution facilities and wastewater treatment facility were professionally engineered, designed and constructed, and have sufficient capacity to meet the demands of the service area for many years;
- h. the system, as transferred, is free of any unsatisfactory features, not subject to DNR violations or enforcement actions;
- i. all water quality and wastewater standards have been met and there has never been an adverse report with regard to meeting these standards;
- j. a supermajority of the systems' current customers (83%) are in favor of the transfer;
- k. the Chapter 393 Companies will be regulated by the DNR;

• Evaluate the location and installation of the water service connections, water service lines, and service sewers, with a determination made on a case by case basis whether a specific improvement, e.g. separation, should be implemented. (Already addressed).

¹⁷² Chapter 393 Companies' Post-hearing Brief, pages 15-16.

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I. the benefits of having central water and wastewater systems in place for future development ensure the public safety and the provision of safe and adequate service at reasonable rates.¹⁷³

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law.

Jurisdiction and Authority

The threshold question the Commission must answer in relation to both cases is if

the Commission has jurisdiction over the Association by virtue of the Association being a public utility. Should the Commission determine that it lacks jurisdiction, then it would be obligated to dismiss the pending complaint actions, and Commission approval would not be required for Folsom Ridge to transfer its water and sewer assets to the Chapter 393 Companies.

"[T]he Public Service Commission is a body of limited jurisdiction and has only such powers as are expressly conferred upon it by the statutes and powers reasonably incidental thereto."¹⁷⁴ As the Commission is an administrative agency with limited jurisdiction, "the lawfulness of its actions depends directly on whether it has statutory power and authority to act."¹⁷⁵ Accordingly, the Commission "has no power to adopt a rule, or follow a practice, which results in nullifying the expressed will of the Legislature."¹⁷⁶ In particular, the Commission "cannot, under the theory of 'construction' of a statute, proceed in a manner contrary to the plain terms of the statute[.]" *Id.* "When determining the statutory authorization for, or lawfulness of, a Commission order the courts do not

¹⁷³ See Findings of Facts Nos. 129-146; Transcript pp. 338-339, 454-456, 853-863; Hearing Exhibit 12, Prefiled Direct Testimony of Barbara Brunk, p. 16, lines 14-23, p. 17, lines 1-2; Hearing Exhibits 9, 10, 11, 12, 13, 14, 15, 16 17, 18, 19, 106, and 107; Testimony of Barbara Brunk, Rick Rusaw, William Hughes, David Kriebel, Michael McDuffey, James Crowder.

¹⁷⁴ *State ex rel. Kansas City Power & Light Co. v. Buzard*, 168 S.W.2d 1044, 1046 (Mo. 1943); *State ex rel. City of West Plains v. Pub. Serv. Comm'n*, 310 S.W.2d 925, 928 (Mo. banc 1958).

¹⁷⁵ *State ex rel. Gulf Transp. Co. v. Pub. Serv. Comm'n*, 658 S.W.2d 448, 452 (Mo. App. 1983).

¹⁷⁶ *State ex rel. Springfield Warehouse & Transfer Co. v. Pub. Serv. Comm'n*, 225 S.W.2d 792, 794 (Mo. App. 1949).

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defer to the commission, which has no authority to declare or enforce principles of law or equity."¹⁷⁷

In short, the Public Service Commission is a creature of statute and its jurisdiction is controlled by statute.¹⁷⁸ The commission is not a court. It is a creature of the Legislature. Its jurisdiction, powers, and duties are fixed by statute.¹⁷⁹ A basic tenet of administrative law provides that "an administrative agency has only such jurisdiction or authority as may be granted by the legislature."¹⁸⁰ If the Commission lacks statutory power, it is without subject matter jurisdiction, and subject matter jurisdiction cannot be enlarged or conferred by consent or agreement of the parties.¹⁸¹

Whether the Commission has jurisdiction over Folsom Ridge or the Association hinges on the statutory definition, and the state appellate courts' interpretations of that statutory definition, as to what constitutes a public utility subject to the control and regulation of the Commission.

Section 386.020(42) defines "public utility" as including:

... **every** pipeline corporation, gas corporation, electrical corporation, telecommunications company, **water corporation**, heat or refrigerating corporation, and **sewer corporation**, as these terms are defined in this section, and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this chapter.

Section 386.020(58) defines "water corporation" as including:

... **every** corporation, company, **association, joint stock company or association**, partnership and person, their lessees, trustees, or receivers appointed by any court whatsoever, **owning, operating, controlling or**

¹⁷⁷ *State ex rel. Util. Consumers Council, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 47 (Mo. banc 1979).

¹⁷⁸ *State ex rel. Smithco Transport Co. v. Public Service Commission*, 307 S.W.2d 361, 374 (Mo. App. 1957) (overruled on other grounds, 316 S.W.2d 6 (Mo. banc 1958)).

¹⁷⁹ *State ex rel. Doniphan Tel. Co. v. Public Service Commission*, 369 S.W.2d 572, 575 (Mo. 1963).

¹⁸⁰ *Carr v. North Kansas City Beverage Co.* 49 S.W.3d 205, *207 (Mo. App. 2001); *Livingston Manor, Inc. v. Dep't of Soc. Servs., Div. of Family Servs.*, 809 S.W.2d 153, 156 (Mo. App. 1991).

¹⁸¹ *Carr v. North Kansas City Beverage Co.* 49 S.W.3d 205, *207 (Mo. App. 2001); *Livingston Manor, Inc. v. Dep't of Soc. Servs., Div. of Family Servs.*, 809 S.W.2d 153, 156 (Mo. App. 1991).

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managing any plant or property, dam or water supply, canal, or power station, distributing or selling for distribution, or selling or supplying for gain any water.

Section 386.020(48) defines “sewer corporation as including:

... every corporation, company, association, joint stock company or association, partnership or person, their lessees, trustees or receivers appointed by any court, owning, operating, controlling or managing any sewer system, plant or property, for the collection, carriage, treatment, or disposal of sewage anywhere within the state for gain, except that the term shall not include sewer systems with fewer than twenty-five outlets.

The statutes contemplate that these types of companies would have to offer their services for “gain” in order to fall under the jurisdiction of the Commission. In *Osage Water Co. v. Miller County Water Authority, Inc.*, 950 S.W.2d 569 (Mo. App. 1997), the Court of Appeals determined that not-for-profit corporations, where no part of the income or property is distributable to its members, directors, or officers, were not excluded from legislature’s definition of a “water corporation.”¹⁸² The Osage Court, although without providing legal analysis, equated the terms “gain” and “compensation.”¹⁸³

¹⁸² *Osage Water Co.*, 950 S.W.2d at 574. The Commission has indicated that this reasoning equally applies to the definition of a “sewer corporation.” See *In the Matter of the Joint Application of South Jefferson County Utility Company and the Summer Sea Property Owners Association for Cancellation of a Certificate of Convenience and Necessity and Associated Tariff Sheets* Case No. WD-2006-0157, 2005 WL 3330327 (Mo. P.S.C.). Order Directing Filing issued November 23, 2005.

¹⁸³ *Osage Water Co.*, 950 S.W.2d at 574. See also *The Staff of the Missouri Public Service Commission v. Hurricane Deck Holding Company, et al.* Case No. WC-2006-0303, Order Granting in Part and Denying in Part Staff’s Motion for Summary Determination issued on August 31, 2006. It should be noted that, given that the Court of Appeals’ decision in the *Osage Water* case failed to undertake any analysis of the definitions of these words, further appellate review of this interpretation could yield a reversal of this position given that gain is traditionally defined as being profit. See Black’s Law Dictionary, Sixth Edition, West Publishing Co. 1990, p. 678; The American Heritage College Dictionary, 3rd Edition, Houghton Mifflin Co. 1997, p. 556; Webster’s Third New International Dictionary, Unabridged, Merriam-Webster, Inc. 1986, p. 928. Profit signifies gain, and gain is an excess of income over and above expenses. *Sindey Smith, Inc. v. Steinberg*, 316 S.W.2d 243, 255 (Mo. App. 1958). “Gain is an increase or addition to what one has of that which is profit, advantage or benefit; resources or advantage

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This Commission is bound by the decisions of the appellate courts and the findings of fact in this case demonstrate the Association is incorporated as a not-for-profit entity with no income or property being distributable to Folsom Ridge, the owners of the water and sewer assets. The Court of Appeals' use of the word "compensation" when applied to the statutes defining water and sewer corporations and the facts of this case results in the conclusion that: Folsom Ridge owns the assets of the Association, which in turn is a stock corporation operating and managing plant or property for distribution or supplying of water for compensation and for the collection, carriage, treatment, or disposal of sewage for compensation. Folsom Ridge and the Association fit the statutory definitions of being water and sewer corporations as interpreted by the Court of Appeals, and would potentially fall under the definition of a "public utility" subject the control and regulation of the Commission pursuant to Section 386.020(42).

However, in addition to the plain reading of these statutes, Missouri's courts have further distinguished and defined what constitutes being a public utility. In *State ex rel. M.O. Danciger & Company v. Public Serv. Comm'n*, the Missouri Supreme Court held that for a company to be considered a public utility its services must be devoted to the public use.¹⁸⁴ The Court held that: "The regulation and control of business of a private nature is sustained by reference to the police power, and even then it is sustained only when the courts have been able to say that a business is in character and extent of operation such that it touches the whole people and affects their general welfare."¹⁸⁵ Consequently, the Court articulated the test for determining if a company was devoting its services to the public use when it summarized and stated: "The fundamental characteristic of a public calling is indiscriminate dealing with the general public."¹⁸⁶ In a later case,

acquired; profit; opposed to loss." *In re Breuer's Income Tax*, 190 S.W.2d 248, 249 (Mo. 1945).

¹⁸⁴ *State ex rel. M.O. Danciger & Company v. Public Serv. Comm'n*, 205 S.W. 36, 40 (Mo. banc 1918).

¹⁸⁵ *Id.* at 41.

¹⁸⁶ *Danciger*, 205 S.W. at 42. Following this same line of reasoning, the Missouri Supreme Court later held that an electric company selling electric energy to only one customer (a corporate entity) that had not devoted its property to any public use in any manner, was not a public utility and not subject to the jurisdiction of the Commission. *State ex rel. Buchanan County Power Transmission Co. v. Baker et al.*, 9 S.W.2d 589, 591, 592 (Mo. banc 1928). Continuing in this same vein, the Court has held that a small rural exchange phone company serving approximately 41 customers provided service for its own members, not the general public, and was not a public utility subject to the jurisdiction of the Commission. *State ex rel. Lohman & Farmers' Mut. Telephone Co. v. Brown*, 19 S.W.2d 1048, 1049 (Mo. 1929). This

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the Court would further cement its interpretation holding that regardless if the statutes defining corporations falling under the jurisdiction of the Commission have expressly written the idea of the public use into them, it is nonetheless a requirement.¹⁸⁷

In *Osage Water*, while the Court of Appeals determined that not-for-profit corporations providing water service, where no part of the income or property is distributable to its members, directors, or officers, were not excluded from legislature's definition of a "water corporation,"¹⁸⁸ citing to *Danciger*, it also noted that: "To constitute a public utility and be subject to regulation by the Commission, a service must be devoted to public use."¹⁸⁹ The *Osage* Court attempted to distinguish what constituted a service being devoted to the public use and concluded that if a not-for-profit water corporation "sells water to the public for compensation, and its actions suggest that it has undertaken the responsibility to provide water service to all members of the public within its capabilities," the company's service has in fact been devoted to the public use and not merely for particular persons.¹⁹⁰ Consequently, the question as to whether Folsom Ridge or the Association are "public utilities" turns on whether these entities offer service to the general public indiscriminately.

The water and sewer systems owned by Folsom Ridge, and operated and managed by the Association, have the capacity (or are in the process of having capacity expanded) to serve 320 and 230 customers respectively. Big Island currently has 105 residents. As of November 29, 2000, the water and sewer systems were available to the entire island for use by the new owners of the lots being sold and/or developed by Folsom Ridge, and existing residents were given an option to connect to these systems should their existing water and/or sewer systems fail.

same company had one commercial line to Jefferson City, and to that extent only, it was found to be a public utility and the Commission had regulatory authority in relation to that single line.
Id.

¹⁸⁷ *Baker*, 9 S.W.2d at 591.

¹⁸⁸ *Osage Water Co.*, 950 S.W.2d at 574. The Commission has indicated that this reasoning equally applies to the definition of a "sewer corporation." See *In the Matter of the Joint Application of South Jefferson County Utility Company and the Summer Sea Property Owners Association for Cancellation of a Certificate of Convenience and Necessity and Associated Tariff Sheets* Case No. WD-2006-0157, 2005 WL 3330327 (Mo. P.S.C.). Order Directing Filing issued November 23, 2005.

¹⁸⁹ *Osage Water Co.*, 950 S.W.2d at 574; *Khulusi v. Southwestern Bell Yellow Pages, Inc.*, 916 S.W.2d 227, 232 (Mo. App. 1995) (citing, *Danciger*, 205 S.W. at 40).

¹⁹⁰ *Osage Water Co.*, 950 S.W.2d at 575. It should be noted that the Court of Appeals' substitution of the word compensation for the word gain was done in a conclusory manner, without legal analysis or citation to any authority.

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Out of the 105 residents on Big Island, there are approximately 60 customers connected to, and served by, the wastewater system. There are approximately a total of 48 customers connected to, and served by, the water distribution system. There are approximately 33 households who have paid connection or tap-on fees that have not connected to the system. There are approximately 92 customers that are billed by the Association. People who are not connected pay a monthly reservation/maintenance fee to preserve their right to connect, but they are not billed for, and do not receive, water or sewer services.

As defined in Section 386.020(47): "Service includes not only the use and accommodations¹⁹¹ afforded consumers or patrons, but also any product or commodity furnished by any corporation, person or public utility and the plant, equipment, apparatus, appliances, property and facilities employed by any corporation, person or public utility in performing any service or in furnishing any product or commodity and devoted to the public purposes of such corporation, person or public utility, and to the use and accommodation of consumers or patrons." The reservation of a tap-on¹⁹² is not the provision of water or sewer service and does not involve a use, accommodation, product or commodity. Indeed, Mr. Merciel, from the Commission's Staff, testified at hearing that other Commission regulated companies charge similar reservation/maintenance fees, that these are untariffed charges and that these fees do not constitute a charge for utility service.¹⁹³

Complainants have established that there is potentially one non-member to the Association that receives sewer service, Benjamin Pugh,

¹⁹¹ "Accommodation" means to do a service for, or provide for and supply with. American Heritage College Dictionary, 3rd Ed., Houghton Mifflin Co. 1997, p. 8. "Accommodation" means: "an arrangement or engagement made as a favor to another, not upon consideration received." Black's Law Dictionary, 6th Ed. West Publishing Co. 1990, p. 16. Clearly, paying a tap-on fee is not a favor without legal consideration.

¹⁹² The physical tap-on is part of the "water system" or "sewer system" as defined by sections 386.020(49) and (59). Section 386.020(49) defines "sewer system" as including "all pipes, pumps, canals, lagoons, plants, structures and appliances, and all other real estate, fixtures and personal property, owned, operated, controlled or managed in connection with or to facilitate the collection, carriage, treatment and disposal of sewage for municipal, domestic or other beneficial or necessary purpose." Section 386.020(59) defines "water system" as including "all reservoirs, tunnels, shafts, dams, dikes, headgates, pipes, flumes, canals, structures and appliances, and all other real estate, fixtures and personal property, owned, operated, controlled or managed in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing or carriage of water for municipal, domestic or other beneficial use."

¹⁹³ Transcript pp. 1093-1096.

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and his status as a member is debatable. Mr. Pugh was allowed to connect during the time period that the Association first offered service. In fact, Mr. Pugh was the first individual to connect to the sewer system. It should be noted that at the time Mr. Pugh was allowed to connect, the sewer system was serving less than 25 outlets and was clearly outside the jurisdiction of the PSC. The system did not provide service to 25 outlets until 2001, after the Association had recorded covenants and restrictions requiring membership in the Association in order to tap-on to the system.

When the Association asked Mr. Pugh to join the Association, he refused. When asked to disconnect and receive a full refund for his tap-on fees, Mr. Pugh refused. On November 16, 2001, the Missouri Department of Natural Resources advised Folsom Ridge that, in accordance with 10 CSR 20-6.010(3)(B)(5)(C)(IV), "everyone connected to the wastewater treatment system shall be bound by the rules of the homeowners association, and thus be a member."¹⁹⁴ On November 29, 2001, after receiving the DNR's November 16, 2001 letter, the Association notified Benjamin Pugh that although he had not acknowledged membership in the Association he was bound by the rules and regulations of the Association since he was connected to the water and sewer system and he was considered to be a member of the Association pursuant to the DNR's regulations and DNR's interpretation of those regulations.¹⁹⁵ The Association has treated Mr. Pugh as a member with full membership status and voting rights.

During the hearing, Phillip Hiley, also a Big Island resident, but not a complainant in this matter, testified that he did not consider himself to be a member of the Association because he did not ratify the Association's bylaws, but that he pays monthly fees for "someone now hooked on" to the system. Mr. Hiley also testified that he attended the Association's meeting concerning the transfer of assets to the Chapter 393 Companies and that he "probably" voted at that meeting. There is no evidence in the record to clarify if Mr. Hiley is actually "hooked on" to either the water or sewer service, or both, or if he was referring to having paid "tap-on" fees and/or monthly reservation/maintenance fees. Consequently, there is no competent and substantial evidence to allow for a conclusion that Mr. Hiley has the same relationship with the Association as does Mr. Pugh.

¹⁹⁴ Hearing Exhibit 54, Letter from Kristine Ricketts, Regional Director of the DNR to Mr. Reggie Golden, dated November 16, 2001.

¹⁹⁵ Hearing Exhibit 52, Letter from Charles E. McElyea to Mr. and Mrs. Pugh, dated November 29, 2001; Transcript p. 633, lines 15-25, p. 634, lines 1-12.

There is no additional evidence in the record to establish that anyone else could be considered a non-member of the Association that is receiving water or sewer service. All evidence indicates that no one currently is allowed to connect without first becoming a member of the Association.¹⁹⁶ Consequently, with the exception of 1 or 2 possible aberrancies (Mr. Pugh and potentially Mr. Hiley) the Association does not offer water and sewer service to all members of the general public within its service capabilities, but rather offers services to a discrete group of people who become members of the Association. Even the aberrancies, which occurred during the Association's infancy, are treated as being members of the Association by virtue of DNR's instructions.

Substantial and competent evidence in the record establishes that service is only offered to individuals that have paid tap-on fees for access and who have become members of the Association. Thus, while the water and sewer systems are available to all current Island residents, and to potential future Island residents, they are only being offered on an optional basis to a discrete group of people (members of the Association), not the general public.

Rocky Ridge Ranch Public Interest Analysis

There have been past cases before the Commission where an entity providing water and/or sewer service has changed its corporate structure and the Commission has recognized that it no longer holds jurisdiction over those entities. In the case, *In the Matter of Rocky Ridge Ranch Property Owners Association for an Order of the Public Service Commission Authorizing Cessation of the PSC Jurisdiction and Regulation Over its Operations*, Case No. WD-93-307, the Commission began its jurisdictional analysis by concluding a Property Owners Association (POA) operating a water distribution system on a nonprofit basis **"is a not-for-profit corporation and as such does not distribute or sell water 'for gain.'"** This conclusion, that a not-for-profit association would not fall under

¹⁹⁶ There is no record evidence concerning when the first individual connected to the water system. Nor is there any evidence in the record to establish the composition of any customers receiving water service from Folsom Ridge and the Association, i.e. whether they are members of the Association, nonmembers, or have changed membership status over time. Given there is no factual evidence on these matters, it is impossible for the Commission to make any conclusions of law with regard to who is currently connected to the water system, except to note that covenants and restrictions requiring membership in the Association have been in place since 2001 and the Association requires membership prior to commencing service – these are facts established by the evidence.

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the definition of a water corporation in Section 386.020(58),¹⁹⁷ was made prior to *Osage Water* and that criteria can no longer be applied. However, that conclusion was not the deciding factor in *Rocky Ridge Ranch*.

In *Rocky Ridge Ranch*, the Commission's Staff recommended three criteria for classifying what it termed as being a "legitimate" property owner's association that would not fall under the Commission's jurisdiction. Those criteria were:

- 1) It must have as membership all of its utility customers, and operate the utility only for the benefit of its members;
- 2) It must base the voting rights regarding utility matters on whether or not a person is a customer, as opposed to, allowing one (1) vote per lot which would not be an equitable situation if one (1) person owned a majority of the lots irrespective of whether each of those lots subscribed to the utility service; and
- 3) It must own or lease the utility system so that it has complete control over it.

It is important to note that at the time of this decision none of these criteria was statutorily based, but rather were more appropriately part of a public interest analysis.¹⁹⁸ As noted earlier, if the Commission lacks statutory power, it is without subject matter jurisdiction, and subject matter jurisdiction cannot be enlarged or conferred by consent or agreement of the parties.¹⁹⁹

Recognizing the appropriate statutory standards, in *Rocky Ridge Ranch*, the Commission determined that **only one** of these criteria was important to its decision on jurisdiction. That criterion, the membership requirement, was an appropriate application of the Missouri Supreme Court's test in *Danciger*, recognizing that an entity was not a public utility if it did not provide service to the general public indiscriminately. As it explained in the Commission's final paragraph of discussion in the order:

¹⁹⁷ At the time of the *Rocky Ridge Ranch* decision, the statutory definition of a water corporation was found in Section 386.020(51).

¹⁹⁸ Currently, nonprofit water and sewer companies may incorporate under the provisions of Chapter 393. these provisions, *inter alia*, essentially codify the public interest factors from the *Rocky Ridge Ranch* case, and if a corporation complies with Chapter 393's statutory scheme, jurisdiction over that corporation expressly lies with the DNR.

¹⁹⁹ *Carr v. North Kansas City Beverage Co.* 49 S.W.3d 205, 207 (Mo. App. 2001); *Livingston Manor, Inc. v. Dep't of Soc. Servs., Div. of Family Servs.*, 809 S.W.2d 153, 156 (Mo. App. 1991).

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The Commission, having considered all of the competent and substantial evidence upon the whole record, finds that the POA has met its burden by qualifying as an association which does not require regulation under the rules and statutes of the state of Missouri. In Case No. WM-93-136, the Commission found it necessary to continue to retain jurisdiction over the Property Owners Association based upon the finding that the Association would continue to serve customers who were not members of the Association. The Commission now finds changed circumstances due to the changes in the bylaws of the Property Owners Association. **Pursuant to those changes, the Commission finds that the Property Owners Association does and will only provide water service to members of the Association. As such POA does not qualify as a "water corporation" as defined by 386.020(51).** (In the current revision of the Missouri Revised Statutes, the definition is found in Section 386.020 (58)).

As the Commission has already discussed, the Association operating and maintaining the water and sewer system on Big Island complies with the membership requirement. Benjamin Pugh qualifies as a *de facto* member, and the provision of service is restricted to a discrete group, and is not provided to the general public.

As for the remaining two *Rocky Ridge Ranch* factors, while Folsom Ridge currently holds the majority of votes by virtue of its ownership of the majority of lots, the Association's decisions are made by the majority vote of non-Folsom Ridge members and Folsom Ridge has never over-ridden the majority of the remaining membership by exercising its votes. The Association has never declared a dividend to Folsom Ridge or any of its members. Folsom Ridge has never received a fee, commission, or any remuneration from the Association from the rates charged by the Association for water or sewer service. The rates charged by the Association are designed to cover the actual costs of operating and maintaining the system, i.e. the contract operator's charges, the cost of billing and the cost of permits required by environmental and other agencies. Folsom Ridge's interest in the facilities is essentially in name only.

Under the specific facts of this case, not only have the *Rocky Ridge Ranch* criteria been sufficiently satisfied, but Folsom Ridge and the

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Association are currently in the process of transferring all of the assets of the water and sewer system to newly formed Chapter 393 Companies. The provisions of Chapter 393 essentially secure all of the criteria of the public interest analysis of the *Rocky Ridge Ranch*, and expressly remove any such water and/or sewer company from the jurisdiction of the Commission and place jurisdiction over such operations with the DNR. Although the Commission lacks jurisdiction in this matter to approve the transfer of assets, it has determined that if had that authority it would find the transfer to be in the public interest.

Precedential Effect

An administrative body, that performs duties judicial in nature, is not and cannot be a court in the constitutional sense.²⁰⁰ The legislature cannot create a tribunal and invest it with judicial power or convert an administrative agency into a court by the grant of a power the constitution reserves to the judiciary.²⁰¹

An administrative agency is not bound by stare decisis, nor are agency decisions binding precedent on the Missouri courts.²⁰² "Courts are not concerned with alleged inconsistency between current and prior decisions of an administrative agency so long as the action taken is not

²⁰⁰ *In re City of Kinloch*, 362 Mo. 434, 242 S.W.2d 59, 63[4-7] (Mo.1951); *Lederer v. State, Dept. of Social*

Services, Div. of Aging, 825 S.W.2d 858, 863 (Mo. App. 1992).

²⁰¹ *State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69, 75 (Mo. banc 1982); *Lederer*, 825 S.W.2d at 863.

²⁰² *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003); *Fall Creek Const. Co., Inc. v. Director of Revenue*, 109 S.W.3d 165, 172 -173 (Mo. banc 2003); *Shelter Mut. Ins. Co. v. Dir. of Revenue*, 107 S.W.3d 919, 920 (Mo. banc 2003); *Southwestern Bell Yellow Pages, Inc. v. Dir. of Revenue*, 94 S.W.3d 388, 390 (Mo. banc 2002); *Ovid Bell Press, Inc. v. Dir. of Revenue*, 45 S.W.3d 880, 886 (Mo. banc 2001); *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Committee*, 142 S.W.3d 228, 235 (Mo. App. 2004); *Cent Hardware Co., Inc. v. Dir. of Revenue*, 887 S.W.2d 593, 596 (Mo. banc 1994); *State ex rel. GTE N. Inc. v. Mo. Pub. Serv. Comm'n*, 835 S.W.2d 356, 371 (Mo. App. 1992). On the other hand, the rulings, interpretations, and decisions of a neutral, independent administrative agency, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Lacey v. State Bd. of Registration For The Healing Arts*, 131 S.W.3d 831, 843 (Mo. App. 2004). "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944).

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otherwise arbitrary or unreasonable.”²⁰³ The mere fact that an administrative agency departs from a policy expressed in prior cases which it has decided is no ground alone for a reviewing court to reverse the decision.²⁰⁴ “In all events, the adjudication of an administrative body as a quasi-court binds only the parties to the proceeding, determines only the particular facts contested, and as in adjudications by a court, operates retrospectively.”²⁰⁵

The Commission has repeatedly emphasized that its decision in this matter is specific to the facts of this case. Determining jurisdiction is done on a case-by-case basis and is a fact intensive inquiry. Consequently, the Commission makes it abundantly clear that, consistent with its statutory authority, this decision does not serve as precedent for any future determinations of the Commission’s jurisdiction.

Burden of Proof

Section 386.390, RSMo 2000, authorizes the individual complainants in Case No. WC-2006-0082 to bring a complaint before the Commission regarding a public utility. “In cases where a complainant alleges that a regulated utility is violating a law, its own tariff, or is otherwise engaged in unjust or unreasonable actions, the complainant has the burden of proof.”²⁰⁶ The complaining parties in consolidated Case No. WC-2006-0082 bear the burden of proving the allegations in their complaints. The Complainants have failed to establish, by competent and substantial evidence, that the Commission has jurisdiction over these matters. Consequently, the Commission must dismiss these actions as it has no authority to make a determination with regard to the complaints or the transfer of assets.

²⁰³ *Columbia v. Mo. State Bd. of Mediation*, 605 S.W.2d 192, 195 (Mo. App. 1980); *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Committee*, 142 S.W.3d 228, 235 (Mo. App. 2004).

²⁰⁴ *Id.*

²⁰⁵ *State ex rel. Gulf Transport Co. v. Public Service Com’n of State*, 658 S.W.2d 448, 466 (Mo. App. 1983); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 765, 89 S.Ct. 1426, 1429, 22 L.Ed.2d 709 (1969); *State ex rel. Summers v. Public Service Commission*, 366 S.W.2d 738, 741[1-4] (Mo. App. 1963); *State ex rel. Consumers Public Service Co. v. Public Service Commission*, 352 Mo. 905, 180 S.W.2d 40, 46[6-8] (banc 1944); §§ 386.490 and 386.510. 1 Cooper, *State Administrative Law*, pp. 177 et seq. (1965); Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, *Duke Law Journal*, Vol. 1980: 103, 118.

²⁰⁶ *David A. Turner and Michele R. Turner, Complainants, v. Warren County Water and Sewer Company, Respondent*, 9 Mo. P.S.C. 3d 548 (Mo. PSC 2001), citing to, *Margolis v. Union Electric Company*, 30 Mo. P.S.C. (N.S.) 517, 523 (1991); *Michaelson v. Wolf*, 261 S.W.2d 918, 924 (Mo. 1953); *Farnham v. Boone*, 431 S.W.2d 154 (Mo. 1968).

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As noted in finding of fact numbers 15 and 80, numerous parties to these actions were subject to dismissal.²⁰⁷ Had the Commission determined that it had jurisdiction over these matters, it would have ruled on whether those parties should be dismissed. Because the Commission has determined that it lacks jurisdiction in these matters, and because the Commission is dismissing these actions in their entirety, there is no need to rule on the posture of those parties to these actions.

Decision

The Commission in making this decision has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision. After applying the facts, as it has found them, to its conclusions of law, the Commission has reached the following decision. Case numbers WC-2006-0082, WC-2006-0090, WC-2006-0107, WC-2006-0120, WC-2006-0121, WC-2006-0122, WC-2006-0138, WC-2006-0139 and WA-2007-0270 shall be dismissed for lack of jurisdiction.

IT IS ORDERED THAT:

1. Case numbers WC-2006-0082, WC-2006-0090, WC-2006-0107, WC-2006-0120, WC-2006-0121, WC-2006-0122, WC-2006-0138, WC-2006-0139 and WA-2007-0270 are dismissed for lack of jurisdiction.

²⁰⁷ On May 1, 2007, Respondents renewed their motion to dismiss these parties. On May 7, 2007, Complaints filed, on behalf of several of these parties, statements representing them to be evidence in support of these parties' positions. As previously noted: Assertions or allegations in pleadings do not constitute evidence. It is well established legal doctrine that unsworn statements of attorneys or parties, statements in briefs, pleadings, motions, arguments, allegations, or charging documents, as well as articles or exhibits not formally or constructively introduced are not evidence of the facts asserted unless conceded to by the opposing party. *State ex rel. TWA, Inc. v. David*, 158 S.W.3d 232, 236 (Mo. Banc 2005) (Judge White Dissenting), *citing to*, *State ex rel. Dixon v. Darnold*, 939 S.W.2d 66, 69 (Mo. App. 1997); *State v. Smith*, 154 S.W.3d 461, 469 (Mo. App. 2005); *Lester v. Sayles*, 850 S.W.2d 858, 864 (Mo. Banc 1993); *State v. Rutter*, 93 S.W.3d 714, 727 (Mo. Banc 2002); *State v. Robinson*, 825 S.W.2d 877, 880 (Mo. App. 1992); *State ex rel. Horn v. Randall*, 275 S.W.2d 758, 763-764 (Mo. App. 1955). To have legal standing to prosecute a legal action a party seeking relief must have a legally cognizable interest in the subject matter and he or she must be facing a threatened injury or have suffered actual injury. *Eastern Missouri Laborers Dist. Council v. St. Louis County*, 781 S.W.2d 43, 46 (Mo. banc 1989). "A legally protectible interest contemplates a pecuniary or personal interest directly in issue or jeopardy which is subject to some consequential relief, immediate or prospective." *Absher v. Cooper*, 495 S.W.2d 696, 698 (Mo. App. 1973).

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2. All objections not ruled on are overruled and all motions not granted are denied.
3. This order shall become effective on June 24, 2007.
4. This case may be closed on June 25, 2007.

Davis, Chm., Murray and Appling, CC., concur;
Gaw, C., dissents;
Clayton, C. dissents with dissenting opinion to follow;
and certify compliance with the provisions of
Section 536.080, RSMo.

NOTE: At the time of publication, no dissenting opinions have been issued.

In the Matter of the Assessment Against the Public Utilities in the State of Missouri for the Expenses of the Commission for the Fiscal Year Commencing July 1, 2007

Case No.: AO-2007-0486
Decided: June 22, 2007

Public Utilities § 1. The Commission assessed a total of \$16,249,374 to Missouri's public utilities for payment of the Commission's anticipated operating expenses for fiscal year 2008.

Public Utilities § 5. The Commission assessed a total of \$16,249,374 to Missouri's public utilities for payment of the Commission's anticipated operating expenses for fiscal year 2008.

ASSESSMENT ORDER FOR FISCAL YEAR 2008

Pursuant to 386.370, RSMo Supp. 2006, the Commission estimates the expenses to be incurred by it during the fiscal year commencing July 1, 2007. These expenses are reasonably attributable to the regulation of public utilities as provided in Chapters 386, 392 and 393, RSMo and amount to \$17,909,436. Within that total, the Commission estimates the expenses directly attributable to the regulation of the six groups of public utilities: electrical, gas, heating, water, sewer and telephone, which total for all groups \$10,911,122. In addition to the separately identified costs for

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each utility group, the Commission estimates the amount of expenses that could not be attributed directly to any utility group of \$6,998,314.

The Commission estimates that the amount of Federal Gas Safety reimbursement will be \$277,500. The unexpended balance in the Public Service Commission Fund in the hands of the State Treasurer on July 1, 2007, is estimated to be \$1,382,562. The Commission deducts these amounts and estimates its Fiscal Year 2008 Assessment to be \$16,249,374. The unexpended sum is allocated as a deduction from the estimated expenses of each utilities group listed above, in proportion to the group's gross intrastate operating revenue as a percentage of all groups' gross intrastate operating revenue for the calendar year of 2006, as provided by law. The reimbursement from the federal gas safety program is deducted from the estimated expenses attributed to the gas utility group.

The Commission allocates to each utility group its directly attributable estimated expenses. Additional common, administrative and other costs not directly attributable to any particular utility group are assessed according to the group's proportion of the total gross intrastate operating revenue of all utilities groups. Those amounts are set out with more specificity in documents located on the Commission's web page at <http://www.psc.mo.gov>.

The Commission fixes the amount so allocated to each such group of public utilities, net of said estimated unexpended fund balance and federal reimbursement as follows:

Electric	\$ 6,532,037
Gas	\$ 4,956,743
Heating	\$ 27,337
Water	\$ 1,257,256
Sewer	\$ 303,158
Telephone	\$ 3,172,843
Total.....	\$16,249,374

The Commission allocates a proportionate share of the \$16,249,374 to each industry group as indicated above. The amount allocated to each industry group is allotted to the companies within that group. This allotment is accomplished according to the percentage of each individual company's gross intrastate operating revenues compared to the total gross intrastate operating revenues for that group. The amount allotted to a company is the amount assessed to that company.

The Budget and Fiscal Services Department of the Commission is hereby directed to calculate the amount of such assessment against each public utility, and the Commission's Executive Director shall render a

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statement of such assessment to each public utility on or before July 1, 2007. The assessment shall be due and payable on or before July 15, 2007, or at the option of each public utility, it may be paid in equal quarterly installments on or before July 15, 2007, October 15, 2007, January 15, 2008, and April 15, 2008. The Budget and Fiscal Services Department shall deliver checks to the Director of Revenue the day they are received.

All checks shall be made payable to the Director of Revenue, State of Missouri; however, these checks must be sent to:

Missouri Public Service Commission
Budget and Fiscal Services Department
P.O. Box 360
Jefferson City, MO, 65102-0360

IT IS ORDERED THAT:

1. The assessment for fiscal year 2008 shall be as set forth herein.
2. The Budget and Fiscal Services Department of the Commission shall calculate the amount of such assessment against each public utility.
3. On behalf of the Commission, the Commission's Executive Director shall render a statement of such assessment to each public utility on or before July 1, 2007.
4. Each public utility shall pay its assessment as set forth herein.
5. The Budget and Fiscal Services Department shall deliver checks to the Director of Revenue the day they are received.
6. This order shall become effective on July 1, 2007.

Davis, Chm., Murray, Gaw, Clayton,
and Appling, CC., concur.

Dale, Chief Regulatory Law Judge

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USW Local 11-6 v. Laclede Gas Company

Case No.: GC-2006-0390

Decided: June 22, 2007

Gas §16. The Commission upon its review of a filed complaint by USW Local 11-6, which alleged Laclede had failed to provide safe adequate service relating to the installation of Automatic Meter Reading Devices on its meters, concluded that the service provided by Laclede relating to the installation of AMR devices on its meters was safe and adequate. Therefore, USW Local 11-6's First Amended Complaint was denied on its merits and dismissed.

APPEARANCES

Sherrie A. Schroder and Mike Evans, Hammond, Shinnors, Turcotte, Larrew and Young, P.C., 7730 Carondelet Avenue, Suite 200, St. Louis, Missouri 63105, for United Steel Workers of America, Local 11-6, AFL-CIO.

Michael C. Pendergast and Rick Zucker, Laclede Gas Company, 720 Olive Street, Room 1520, St. Louis, Missouri 63101, for Laclede Gas Company.

Marc D. Poston, Senior Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel.

Robert V. Franson, Senior Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Morris L. Woodruff, Deputy Chief Regulatory Law Judge

REPORT AND ORDER

Syllabus: The Commission finds that United Steelworkers Local 11-6 has not proved its allegations against Laclede Gas Company relating to the company's installation of automatic meter reading devices on its meters. Local 11-6's complaint is denied.

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FINDINGS OF FACT

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Procedural History

On April 10, 2006, United Steel Workers Local 11-6, the union that represents certain employees of Laclede Gas Company, filed a complaint against Laclede. The complaint alleged Laclede was implementing an automated meter reading (AMR) program by which an electronic device is installed on residential meters to remotely read gas usage on the meter. The complaint alleges that employees of CellNet Technology, Inc., the company Laclede has contracted with to install the AMR devices, are not receiving adequate training and as a result, numerous installations have resulted in meter damage and gas leaks. The complaint asks the Commission to order Laclede to continue installation of the AMR devices using its own "trained non-managerial personnel" to ensure the devices are installed without damaging the meters or causing gas leaks. The complaint further requests that Laclede be ordered to have its "trained non-managerial personnel" promptly inspect each of the meters already installed by CellNet.

By a notice issued on April 11, pursuant to Commission Rule 4 CSR 240-2.070(7), the Commission served a copy of Local 11-6's complaint on Laclede. Laclede timely responded on May 11, with a Motion to Dismiss Complaint, or in the Alternative, Motion for a More Definite Statement, and Motion to Strike Request for Relief, and, in the Alternative, Answer to Complaint.

On August 10, the Commission denied Laclede's motion to dismiss, but granted the motion for more definite statement, finding that Local 11-6 failed to plead sufficient facts to support its complaint. The Commission also granted, in part, Laclede's motion to strike a portion of the relief requested by Local 11-6. Specifically, the Commission found that it could not require Laclede to use specific personnel to carry out the Commission's order. Therefore, the Commission struck the term "non-managerial" from the relief requested by Local 11-6. Local 11-6 was ordered to file an amended complaint, setting out the facts supporting its claim, no later than

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August 21. Local 11-6 filed its First Amended Complaint on August 21, and Laclede filed its answer on September 20.

The Commission established a procedural schedule requiring the parties to prefile written direct, rebuttal, and surrebuttal testimony. An evidentiary hearing convened on December 11, and continued on December 12. The hearing could not be concluded on those dates, so the hearing resumed, and was completed on February 26, 2007. Post-hearing briefs were submitted on April 27.

Installation of Automatic Meter Reading Devices

Gas distribution companies, such as Laclede, determine the amount of gas a customer uses during a given period of time by installing a meter on the premises to measure the amount of gas flowing into the home or business. Historically, that gas meter was read by a human meter reader who would visually read the dials on the meter and report the reading to the company. The company would then use the manual meter reading to bill the customer for the amount of gas used.

Sometimes, a gas meter is installed on the outside of the home or business. Other times, particularly in older neighborhoods, the meter is installed inside the customer's home. Laclede has approximately 250,000 inside meters in its gas distribution system.¹ While a gas company may have problems visually reading any meter, inside or outside, inside meters present particular problems for meter readers because someone must be at home to let the meter reader into the house if the meter is to be read.

If Laclede's meter reader is unable to get into a house to read the meter, the company must use an estimated usage amount to calculate the customer's bill for that month. If the company continues to have problems accessing the meter, it will continue to send out bills based on estimated usage until it is able to obtain an actual meter reading. If the actual meter reading eventually shows the estimated usage to be lower than actual usage, a customer may be asked to pay the undercharge in addition to his or her regular bill, resulting in many angry customers. Indeed, Laclede has recently faced a complaint before this Commission regarding problems arising from its estimated billing practices.² The problems resulting from the inability to access a customer's meter can be alleviated by installing an electronic device on the meter to automatically read the meter and transmit the reading to the company.

¹ Seamands Rebuttal, Ex. 42, Page 3, Line 2.

² Commission Case Number GC-2006-0318.

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In March 2005, Laclede entered into a contract with CellNet Technology, Inc. to automate the reading of all 650,000 meters in its service territories.³ CellNet subcontracted with Honeywell Corporation to install the automated meter reading (AMR) devices.⁴ Honeywell was paid a fee per device installed⁵ and was responsible for hiring the workers needed to install the devices. Honeywell turned to Manpower, Inc., a temporary employment agency, to find the large number of temporary workers needed to install the AMR devices on Laclede's meters. At the peak of the installation process, approximately 85 people were employed as installers.⁶

Temporary workers hired to install AMR devices were required to pass a prehire drug and alcohol test, and undergo a criminal background check, as well as a check of their driving record. The workers were also required to have a high school diploma or GED, and were required to provide their own vehicle.⁷ After they were hired, the installers were given a training program, including safety information, using materials prepared jointly by Laclede and CellNet.⁸ The installers were not, however, trained gas workers.

Deployment of the AMR devices began in July 2005.⁹ At the time of the February 2007 hearing, over 600,000 AMR devices had been installed. Laclede anticipated that installation of the remaining devices would be complete by early summer 2007.¹⁰ So by the time this order is issued, the installation process will likely be nearly complete.

At the beginning of the hearing, Clark Korbisch, Vice-President of Customer Operations for CellNet,¹¹ offered a demonstration of the technique used by Honeywell and Manpower employees to install the CellNet AMR devices on Laclede's existing meters. Korbisch's demonstration revealed the relative simplicity of the installation process. The installer simply unscrews four screws to detach the original index from the meter. He or she then screws the AMR module to the meter frame using the original screw holes, inserts the original index into the AMR module, and attaches the AMR index cover over the module.¹² The AMR

³ Seamands Rebuttal, Ex. 42, Page 2, Lines 6-9

⁴ Korbisch Rebuttal, Ex. 7, Page 3, Lines 20-21.

⁵ Deposition of Redepenning, Ex. 31, Page 44, Lines 21-22

⁶ Id. at Page 59, Lines 9-14.

⁷ Id. at Page 47, Lines 17-24.

⁸ Korbisch Rebuttal, Ex. 7, Page 4, Lines 5-8.

⁹ Seamands Rebuttal, Ex. 42, Page 2, Line 9.

¹⁰ Transcript, Page 1025, Lines 13-23.

¹¹ Korbisch Rebuttal, Ex. 7, Page 1, Lines 5-7.

¹² Transcript, Pages 5-15.

installation takes place entirely on the outside of the meter and never interferes with the flow of gas.

Does the Installation of an AMR Device Cause the Meter to Leak?

Local 11-6's complaint alleges that Laclede's ability to provide safe and adequate service to its customers is impaired by the installation of AMR devices on the meters by inadequately trained installers. Despite the simplicity of the installation process, Local 11-6 contends meters can be damaged during the installation process in two ways, either of which, it contends, could result in dangerous gas leaks. Local 11-6's first concern is based on a couple of incidents early in the installation process.

In their efforts to remove the existing index from some gas meters, the AMR installers occasionally encountered stripped screws that could not be removed with a screw driver. With the concurrence of Laclede, CellNet formed a team of experienced installers who specialized in using a power drill to drill into the stripped screw and then reverse the drill to back the screw out.¹³ In separate incidents on January 17¹⁴ and January 20, 2006,¹⁵ an installer apparently drilled too deeply and penetrated into the area of the meter through which gas flows, causing gas to blow out of the meter. Following these incidents, Laclede discontinued the use of power drills by the installers.¹⁶ No drilling on meters in the field is allowed. Problem meters are instead removed and repaired at Laclede's meter shop.¹⁷ However, approximately 190,000 meters had been installed before the use of power drills was stopped.¹⁸

Despite Laclede's decision to stop the use of power drills in the installation of CellNet devices in early 2006, one more apparent drill-through incident was reported. On November 10, 2006, Jim Johnson, a Laclede service employee was dispatched to a St. Louis area business in response to a report of a gas smell in the building's boiler room. Johnson smelled gas when he arrived and detected a high gas-in-air reading near the AMR device at the top of the meter.¹⁹ Although there was a high level of gas directly above the meter, the open-air reading in the room away from the meter was zero and the building was not evacuated.²⁰

¹³ Seamands Rebuttal, Ex. 42, Page 9, Lines 10-14; Transcript, Page 34, Lines 18-20.

¹⁴ Pat White Direct, Ex. 5, Page 5, Lines 19-23.

¹⁵ Boyle Direct, Ex. 15, Pages 2-3, Lines 15-22, 1-10.

¹⁶ Seamands Rebuttal, Ex. 42, Page 9, Lines 17-18.

¹⁷ Transcript, Pages 313-314, Lines 25, 1-4.

¹⁸ Transcript, Page 316, Lines 16-19.

¹⁹ Jim Johnson Direct, Ex. 34, Page 1, Lines 3-16.

²⁰ Transcript, Page 716, Lines 2-7.

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The maintenance supervisor at the business informed Laclede's gas worker that an AMR device had been installed on the meter the day before.²¹ Upon investigating the source of the gas leak, Laclede's gas worker removed the AMR device and found that two of the screws used to install the AMR device had penetrated the meter casing, causing the leak.²²

Laclede conducted a further investigation of this incident and found that the two punctures in the "hand hole plate" at the top of the meter appear to have been made by a drill.²³ As a result of his investigation and discussions with the installer, Patrick Seamands, Laclede's Chief Engineer, concluded that the installer did not drill the holes, and that Jim Johnson, the Laclede gas service worker, was unlikely to have caused the problem.²⁴ The appearance of drilled holes in the meter is therefore an unsolved mystery.

The safety of using a power drill on a meter through which gas is flowing is questionable. However, to its credit, Laclede stopped the use of power drills by CellNet installers after problems first became apparent. Aside from the mysterious incident in November 2006, there is no evidence that CellNet installers have used power drills on Laclede meters since the practice was discontinued in early 2006. The leaks resulting from the early drill-through incidents were readily apparent and quickly discovered. Any leak caused by a power drill before their use was discontinued would also be obvious and would have been discovered long ago. Therefore, the use of power drills in the installation process is no longer a concern.

Local 11-6's second concern about leaks from meters on which CellNet devices have been installed is less dramatic. Several members of Local 11-6, who are Laclede employees, testified that in the course of doing their jobs they have noticed more leaks from meters since Laclede began to install the AMR devices. Local 11-6 presented such testimony from several meter readers, as well as gas workers in Laclede's service department, and even from customers. The problem with this testimony is that it is entirely based on conjecture and anecdotal observations. These witnesses simply describe leaks they have observed and conclude that the leak must have been caused by the installation of an AMR device.

While these witnesses appear to be sincere in their beliefs, it is apparent that they have little knowledge of the interior workings of a gas meter. For example, Jonathan Guelich, a meter reader, testified to having

²¹ Jim Johnson Direct, Ex. 34, Page 2, Lines 18-19.

²² Id. at Page 3, Lines 6-8.

²³ Seamands Supp. Rebuttal, Ex. 43, Page 3, Lines 12-16.

²⁴ Id. at Page 7, Lines 11-12.

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found leaks on numerous meters after installation of an AMR device. While acknowledging that he was not trained in the service area, he testified that it appeared to him:

sometimes leaks would occur when the AMR device would be screwed on too tightly, pinching the gasket that prevents gas from escaping. In others, the AMR device was not screwed on tightly enough and the gasket would not effectively seal the meter. In both of these situations, the gasket would not contain any leaks within the meter itself and therefore gas could leak.²⁵

At the hearing, during cross examination, Guelich made it clear that the gasket he was talking about was the "little black gasket" between the actual meter and the AMR device.²⁶

Unfortunately for this theory about the cause for gas leaks, Clark Korbisch, during his demonstration of the installation of an AMR device, explained that the gasket around the index cover described by Guelich was designed only to keep insects and anything else out of the index. The gasket cover is not designed to seal in gas and in fact contains small vent holes designed to prevent the buildup of condensation in the index.²⁷ Thus, one theory of how an AMR installation could cause a gas leak was disproved. Yet, Guelich was not aware that the index cover is vented and is not intended to be gas tight.²⁸

Even trained gas workers from Laclede's service department, who install and remove gas meters as part of their job, do not actually work on the meter mechanism. If a meter is not working properly, the service workers simply remove and replace the meter; the nonfunctioning meter is taken to the meter shop for any necessary repairs. Thus, the gas workers have little knowledge of the internal workings of a meter. For example, Pat White, the President of Local 11-6, and a service technician for Laclede,²⁹ acknowledged that he knows little about the details of how an AMR device works,³⁰ and further that he knows little about the inner workings of a meter.³¹ That did not, however, stop Mr. White from offering his own

²⁵ Guelich Direct, Ex. 37, Page 2, Lines 1-9.

²⁶ Transcript, Page 824, Lines 5-8.

²⁷ Transcript, Page 9, Lines 9-22.

²⁸ Transcript, Page 825, Lines 13-16.

²⁹ Pat White Direct, Ex. 5, Page 1, Lines 7 and 14.

³⁰ Transcript, Page 354, Lines 6-17.

³¹ Transcript, Page 392, Lines 24-25.

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theories about how the installation of an AMR device could cause a gas leak.

In his direct testimony, White repeats the theory that improper installation of the index cover gasket can cause a meter to leak.³² He also was not aware that index covers are vented and are not designed to be gas tight.³³ However, in his surrebuttal testimony, White develops a new theory for how an AMR installation might cause a gas leak.

Laclede's Chief Engineer, Patrick Seamands explained in his rebuttal testimony that a meter uses a drive arm extending from the inside of the meter to turn the dials on the index on the outside of the meter to register gas usage. A small seal placed at the center box, the location where the drive arm emerges from the inside of the meter, prevents gas from escaping from the meter. Over time that internal seal may wear out resulting in a small gas leak, which Seamands describes as so small as to be non-hazardous.³⁴

Pat White seizes on Seamands explanation to theorize that improper alignment of the AMR module on the drive axel can cause the drive axel to turn erratically, causing friction on the center box seal, resulting in a gas leak.³⁵ This new theory is based on nothing more than speculation; as White concedes, he has done no studies to test his theory.³⁶ He also concedes his lack of knowledge about the center box.³⁷ Nevertheless, White confidently offers his opinion that any meter leak discovered after an AMR device was installed was most likely caused by the installation.³⁸

Laclede did conduct a study to determine whether meters are more likely to leak after installation of an AMR device. Beginning in October 2005 and continuing through August 2006, all residential meters with AMR devices that were brought into Laclede's meter repair shop were given to two employees, who kept track of the problems they identified with those meters. Their study revealed that meters with AMR devices were actually less likely to come into the shop with leaks than were meters without AMR devices.³⁹

³² Pat White Direct, Ex. 5, Page 3, Lines 6-8.

³³ Transcript, Page 364, Lines 8-13.

³⁴ Seamands Rebuttal, Ex. 42, Pages 5-7.

³⁵ Pat White Surrebuttal, Ex. 6, Page 2, Lines 3-19.

³⁶ Transcript, Page 365, Lines 9-11.

³⁷ Transcript, Page 366, Lines 16-22.

³⁸ Transcript, Page 366, Lines 14-15.

³⁹ Seamands Rebuttal, Ex. 42, Pages 7-8, Lines 14-22, 1-17, and Schedule 1.

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After considering the evidence presented by the parties, the Commission finds that the installation of AMR devices has not caused an increased number of gas leaks from meters on Laclede's system.

Other Safety Concerns

Aside from allegations of increased leaks from meters equipped with AMR devices, Local 11-6 alleges other, more general, safety concerns resulting from the installation of AMR devices. In particular, Local 11-6 argues that the minimally trained workers sent out to install the AMR devices may inadvertently cause other problems and are unlikely to identify gas safety hazards that are not directly related to the installation of the AMR device.

Certainly, the temporary workers hired by Honeywell and Manpower to install the CellNet devices are not trained gas workers. As described in the deposition testimony of Frank Meuting, a temporary worker who has actually installed the CellNet devices, the training the workers received was minimal and focused primarily on learning to read the dials of the meter so that the new device could be properly set.⁴⁰ The safety training the workers received related primarily to their safety while driving and on the job,⁴¹ and did not allow them to be operationally qualified to perform operations tasks on gas meters within the meaning of state and federal gas safety requirements.⁴² However, there is no reason that the workers installing the CellNet need to be trained gas workers.

As the Commission saw for itself during the demonstration offered at the beginning of the hearing, the installation of an AMR device is a simple task that does not require a great deal of education or training. The training the installers received was sufficient to prepare them for that task.

Local 11-6 expressed concern that an installer who roughly handled a meter might inadvertently loosen the union connecting the meter to the gas line resulting in a gas leak.⁴³ Pat White testified that he had seen such leaks occur when trained gas workers were working on a meter so he assumed the same could happen when an installer was working on a meter.⁴⁴

Local 11-6's concerns about installers handling meters roughly are really just speculations about what could happen. Nothing about the

⁴⁰ Testimony of Meuting, Ex. 4.

⁴¹ Copies of the PowerPoint safety presentations shown to new temporary workers are attached to the Deposition of Debra Redepening, Ex. 31.

⁴² Transcript, Page 913, Lines 1-5.

⁴³ Pat White Surrebuttal, Ex. 6, Page 1, Lines 11-13.

⁴⁴ Transcript, Page 375-376, Lines 17-25, 1-11.

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process for installing the AMR device requires the installer to handle the meter in a manner that is likely to loosen a union and cause a leak. Those installers carry pliers and screwdrivers, not hammers and pipe wrenches so it is unlikely they will routinely bang away on the meters.⁴⁵ Of course, strange things can happen, but if an installer smells gas while working on the meter, the installer is instructed to immediately report that leak to Laclede.⁴⁶ On numerous occasions, installers did report gas leaks they discovered while on the job.⁴⁷

As it happens, a gas leak incident similar to the hypothetical problem described by Local 11-6 did, in fact, occur. On December 19, 2006, Mark Boyle was dispatched to a residence to investigate a reported gas smell. When he arrived, he found a high level of gas in the house. Boyle immediately turned off the gas and aired out the house, but did not evacuate the residents.⁴⁸ After the level of gas in the home dropped to a safe level, Boyle determined that the gas was leaking from a loose union. He was able to stop the leak by tightening the union.⁴⁹ Boyle testified that the leak probably resulted from a leaking rubber seal in a 30 year-old union.⁵⁰ A CellNet employee had been in the home less than an hour earlier to reprogram a previously installed AMR device. The CellNet employee denied smelling gas before he left the home.⁵¹ No one knows what caused the gas leak, but it is possible the CellNet employee's activities in reprogramming the AMR device caused the old rubber seal to further loosen, allowing the leak to occur.⁵²

This was an unfortunate incident that fortunately did not have tragic consequences. However, it was only one incident and there is no indication it was anything other than an isolated event. If the old rubber seal was in poor shape, the same leak could have occurred the day before if the customer had simply bumped the meter while cleaning house. Such things do happen and the only way to avoid any risk of a gas leak would be to station a trained gas worker in the home at all times.

Local 11-6's second safety concern does not involve hazards that may be created by the AMR installation process, rather it is concerned that the relatively untrained installation workers will be unlikely to discover

⁴⁵ Transcript, Page 26, Lines 2-10.

⁴⁶ Transcript, Page 30, Lines 20-23.

⁴⁷ Ex. 10HC is a list of such calls.

⁴⁸ Boyle Deposition, Ex. 27, Pages 70-75.

⁴⁹ Id. at Page 106.

⁵⁰ Id. at Page 112.

⁵¹ Seamands Supplemental Rebuttal, Ex. 43, Pages 10-11, Lines 20-23, 1-22.

⁵² Id. at Page 17, Lines 12-22.

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unrelated safety hazards near the meter; hazards that a trained gas worker might be able to spot while working on the meter.

The temporary installation workers are not trained to spot corrosion, or other safety hazards, while they are installing the AMR devices. If trained gas workers were installing the AMR devices instead, they would presumably be more likely to be able to identify such dangerous conditions in the home. Testimony offered by Local 11-6 described several occasions on which hazardous conditions were identified shortly after installers had been on the premises, without noticing the danger. However, even trained gas workers may have difficulty identifying such dangers, as illustrated in the events described by gas worker Everett Minton, when a corroded pipe broke while he was working on it, causing gas to blow in to a basement.⁵³

In considering Local 11-6's argument, it is important to realize that the installation of the AMR devices is not intended to function as a safety inspection. Commission rules require Laclede to perform leak and corrosion inspections on customer meters every three years.⁵⁴ Laclede also does home-sale inspections when a customer's home is sold.⁵⁵ Laclede will still do all those inspections, and the installation of the AMR device does not count as an inspection. In other words, the installation of the AMR device is in addition to, rather than a substitute for, the other ongoing safety inspection requirements.

Local 11-6's final safety concern is with the allegedly erratic movement of the test dials on meter indexes equipped with an AMR device. The dials in question are the half foot dial and the two foot dials, which are test dials not used in meter reading for billing purposes. Laclede explains that several years ago meter manufacturers made a design change to meter indexes to reduce friction on the drive axel, which allows the test dials to move more freely.⁵⁶ Essentially, the dial hand can fall from force of gravity, ahead of the moving gears, with the gears catching up to the dial hand on the upswing. As a result, the movement of these test dials can be erratic, although the erratic movement does not affect the accuracy of the meter.

However, gas workers may "spot" the test dials on the meter to check for possible leaks downstream from the meter. Erratic movement can affect that spotting process. To deal with this problem, Laclede sent a technical update to its gas workers advising them that the test dials should

⁵³ Transcript, Pages 597-620.

⁵⁴ Seamands Rebuttal, Ex. 42, Page 10, Lines 7-13.

⁵⁵ Transcript, Page 585, Lines 21-23.

⁵⁶ Seamands Rebuttal, Ex 42, Page 12, Lines 7-10.

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be spotted when both test hands are on the upswing.⁵⁷ Laclede believes this simple solution corrects the problem,⁵⁸ and Staff's witness agrees.⁵⁹

The Commission finds that any safety issues associated with the erratic movement of test dial have been adequately addressed by Laclede. Furthermore, Local 11-6's witness indicated that erratic movement of the test hands is also a problem with factory installed AMR indices.⁶⁰ Therefore, the erratic movement of test dials seems to be a hardware problem that is not the result of any installation error.

After considering the evidence presented by the parties, the Commission finds that Local 11-6's safety concerns about the installation of AMR devices are unfounded.

Lack of Adequate Records

In its post-hearing brief, Local 11-6 concedes the "dearth of data from which an informed decision can be made in regard to the safety and adequacy of the AMR installation."⁶¹ Local 11-6 blames this lack of evidence on what it describes as inadequate record keeping by Laclede and CellNet, and contends the inadequate record keeping creates a hazard for Laclede's customers.

Local 11-6 argues that Laclede should have conducted, and documented, an investigation before engaging CellNet to install AMR devices on its meters. Local 11-6 does not clearly describe precisely what would have been included in such an investigation, nor does it cite any rule or statute requiring Laclede to conduct such an investigation. The evidence presented to the Commission establishes that no gas safety incident reports resulting from AMR installation have ever been filed with the National Transportation Safety Board.⁶² Furthermore, the evidence establishes that CellNet has been providing AMR service for more than ten years and has installed about 3.5 million AMR devices on gas meters in that time.⁶³ There is no basis to conclude that Laclede should have conducted any additional investigation before contracting with CellNet to install AMR devices on its meters.

Local 11-6 also alleges that Laclede and CellNet failed to keep adequate records regarding the installation of AMR devices. Again, Local

⁵⁷ Exhibit 9.

⁵⁸ Seamands Rebuttal, Ex. 42, Page 12, Lines 14-18.

⁵⁹ Transcript, Page 970, Lines 8-17.

⁶⁰ Carlton Direct, Ex. 13, Page 3, Lines 5-9. Also, Transcript, Page 490, Lines 1-12.

⁶¹ USW Local 11-6's Post-Hearing Brief, Page 12.

⁶² Transcript, Page 851-852, Lines 1-25, 1-14.

⁶³ Korbisch Rebuttal, Ex. 7, Page 2, Lines 11-16.

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11-6 does not allege that Laclede has failed to comply with any particular statute or regulation regarding record keeping. The evidence shows that CellNet kept a record of anytime one of its employees discovers and reports a gas leak.⁶⁴ Indeed a record of such reports was offered into evidence by Local 11-6.⁶⁵ Laclede kept incident reports, known as CIS reports, about leak investigations during the installation process.⁶⁶ The Commission's Staff, which is responsible for reviewing the records maintained by Laclede, did not state any concerns about the utility's record keeping.

Local 11-6 has been unable to document safety hazards resulting from installation of AMR devices on Laclede's gas meters. Rather than concede the lack of such evidence, Local 11-6 asks the Commission to blame the lack of such evidence on poor record keeping by Laclede. There is no evidence to justify casting such blame on Laclede.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law:

1. Laclede is a "Gas Corporation" and a "Public Utility," as those terms are defined at Section 386.020 (18) and (42), RSMo Supp. 2006. As such it is subject to regulation by this Commission.

2. Section 393.130.1, RSMo Supp. 2006, provides:

Every gas corporation, every electrical corporation, every water corporation, and every sewer corporation shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. . . .

3. Local 11-6 is authorized to bring a complaint against Laclede by terms of Section 386.390, RSMo 2000.

4. As the party bringing a complaint, Local 11-6 has the burden of proving its allegations.⁶⁷

5. Section 386.310.1, RSMo 2000, provides as follows:

⁶⁴ Transcript, Page 292, Lines 12-14.

⁶⁵ Ex. 10HC.

⁶⁶ Transcript, Page 544, Lines 14-16.

⁶⁷ State ex rel GS Technologies Operating Co., Inc. v. Pub. Serv. Comm'n, 116 S.W.3d 680 (Mo. App. W.D. 2003).

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The Commission shall have power, after a hearing had upon its own motion or upon complaint, . . . to require every person, corporation, municipal gas system and public utility to maintain and operate its line, plant, system, equipment, apparatus, and premises in such manner as to promote and safeguard the health and safety of its employees, customers, and the public, and to this end to prescribe, among other things, the installation, use, maintenance and operation of appropriate safety and other devices or appliances, to establish uniform or other standards of equipment, and to require the performance of any other act which the health or safety of its employees, customers or the public may demand, . . .

The pertinent portion of Section 393.130.1, RSMo Supp. 2006, provides as follows:

Every gas corporation, . . . shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. . . .

These sections give the Commission authority to order Laclede to take appropriate and necessary actions needed to maintain the safety and reliability of its gas distribution system.

6. Local 11-6 presented testimony from several Laclede customers who, after learning about Local 11-6's concerns about installation of the AMR devices through the news media, asked Laclede to have a trained Laclede, union gas worker install the AMR device on the meter in their home. Laclede refused, in general, to accede to those requests; in some instances telling the customers that they would need to pay an extra fee to have the AMR device installed by a Laclede gas worker instead of a contracted installer.⁶⁸

Testimony was presented at the hearing as to whether Laclede's tariffs allowed it to charge customers for such services. Staff testified that such charges were allowed by Laclede's tariff,⁶⁹ but there was no evidence indicating that any customer had actually been charged for installation of an AMR device by a union worker. The Commission does not need to determine whether Laclede's tariff would allow such charges, because customers clearly have no right to demand that a utility's work be done by a particular class of employee. As the Missouri Supreme Court has

⁶⁸ Waites Direct, Ex. 21, Page 1-2, Paragraph 5.

⁶⁹ Transcript, Page 758, Lines 19-23.

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established, "[t]he customers of a public utility have a right to demand efficient service at a reasonable rate, but they have no right to dictate the methods which the utility must employ in the rendition of that service."⁷⁰

DECISION

After applying the facts as it has found them to the applicable law, the Commission has reached the following decisions regarding the issues described by the parties in the List of Issues filed before the start of the hearing.

1. Has the installation of AMR modules by Laclede violated Section 393.130.1 RSMo (safety and/or adequacy) or any gas safety law, rule, order, or decision of the Commission?

As a public utility, Laclede is required to provide safe and adequate service to its customers. Local 11-6's complaint alleged that Laclede had failed to provide safe and adequate service relating to the installation of AMR devices on its meters. Local 11-6 has failed to present sufficient evidence to prove its allegations. The Commission concludes that the service provided by Laclede relating to the installation of AMR devices on its meters is safe and adequate.

2. If so, what is the appropriate remedy?

Local 11-6 asks the Commission to order Laclede to 1) use trained gas workers to install all remaining AMR devices on meters not yet retrofitted, 2) use trained gas workers to inspect every meter that is equipped with an AMR device at the rate of 80,000 meters per month, 3) compile a hazard analysis schedule relating to the required inspections, and 4) require service employees to pressure test lines any time they have to shut the lock cock off or turn it on.⁷¹

Since the Commission has found the service provided by Laclede to be safe and adequate, no remedy is appropriate.

IT IS ORDERED THAT:

1. USW Local 11-6's First Amended Complaint is denied on its merits and is therefore dismissed.
2. This Report and Order shall become effective on July 2, 2007.

Davis, Chm., Murray, and Appling, CC., concur;
Gaw and Clayton, CC., dissent;
and certify compliance with the provisions
of Section 536.080, RSMo 2000.

DISSENTING OPINION OF COMMISSIONERS

⁷⁰ State ex rel City of St. Joseph v. Pub. Serv. Comm'n, 30 S.W. 2d 8, 14 (Mo. banc 1930).

⁷¹ USW Local 11-6's Post-Hearing Brief, Pages 32-33.

ROBERT M. CLAYTON III AND STEVE GAW

These Commissioners respectfully dissent from the majority Report and Order in this case. By dismissing this claim for insufficient evidence, the majority fails to consider and address important safety concerns. It is the Commission's role to regulate the industry in such a way as to ensure safe and adequate service, especially in an industry where unsafe procedures may lead to serious injury or death. Therefore, any suggestions of unsafe service should be taken seriously and addressed promptly. In this case, USW Local 11-6 puts the Commission on notice that temporary workers with no required training to work on gas meters are being used to install AMR devices on gas meters in Laclede's natural gas distribution system.

Ultimately, the majority found that Local 11-6 failed to present sufficient evidence to prove that installation of AMR modules was not a safe and adequate service. These Commissioners argue that sufficient concerns are raised for the Commission to mandate that properly trained workers be used to install such meters or that a system of inspection be put in place to ensure the highest degree of safety for Missouri's gas customers.

The majority dismisses the evidence presented by Laclede's customers, Local 11-6 workers and workers from Laclede's Construction and Maintenance Department, meter readers, and Service Department as "conjecture and anecdotal observations." Testimony includes reports of leaks found by trained workers subsequent to installation of the AMR devices by temporary workers as well as the general resistance to reports of problems.¹ Cellnet installers stated they were not required to report all leaks. Yet placing this responsibility to differentiate between leaks that are dangerous and those that are not on temporary workers raises serious concerns.² Instances like these point to the need to examine the safety of using untrained workers to install AMR devices. Instead of treating these anecdotes as a lack of evidence, the Commission should recognize them as an indication that a closer look at the adopted installation practice is needed.

While the majority refers to the instances of drilling on meters, they ignore significant safety implications of such practices by temporary workers. The training manuals for AMR installation note that each tool bucket includes a power drill. Improper use of power drills on installation can cause gas leaks. The temporary workers have no training regarding the

¹ See *generally*, USW Local 11-6's Pre-Hearing Brief.

² Testimony of Frank Meuting, Page 114-115.

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flow of gas in the meter or gas safety. In addition, they receive piecework pay for the first 50 meters and then higher pay for every 10 meters in excess of 50 on which they installed an AMR. The workers have financial incentive to use power drills. Even the majority acknowledges that a drill caused a leak on a meter after installers were instructed not to use power drills.

The majority mentions that installers were instructed to report problems and did. However, testimony is that in at least one case it was the consumer not the temporary worker who noticed the gas leak that was reported. The general training provided to the temporary workers did not require or encourage installers to report leaks. Neither did the reporting form given to workers. Disincentives such as being reprimanded or fired did not exist for failing to report a potentially dangerous situation.

Safety is not a zero sum equation. People should not be put in danger because a company wanted to save money, increase efficiency, or finish a project ahead of schedule. The Commission should develop a plan to oversee installations of AMRs to address the safety concerns presented by industry-trained specialists. This may mean using gas-trained workers to complete the installation or inspecting random samples of installed meters to ensure safety. The Commission should consider whether to more fully discuss issues such as the use of electric drills on gas meters and appropriate training procedures for temporary workers. The most appropriate manner to address each of the concerns would be to involve all stakeholders, gas utilities and other experts in a statewide rulemaking docket.

For the reasons above, these Commissioners respectfully dissent.

**In the Matter of Union Electric Company d/b/a AmerenUE's Tariffs
Increasing Rates for Electric Service Provided to Customers in the
Company's Missouri Service Area***

Case No.: ER-2007-0002

Decided: June 28, 2007

Electric § 1. The Commission's Report and Order was clarified to provide that AmerenUE shall pay interest to ratepayers at its short-term borrowing rate for annual accrued SO₂ sales above a base level of \$5 million and shall collect carrying costs from ratepayers at the same rate if sales fall below that base level.

*This case was appealed to the Missouri Court of Appeals (WD69259) and affirmed. See 274 S.W. 3d 569 (Mo. App. W.D. 2009)

**ORDER DENYING APPLICATIONS FOR REHEARING, GRANTING
CLARIFICATION, AND CORRECTING ORDER NUNC PRO TUNC**

On May 22, 2007, the Commission issued a Report and Order regarding Union Electric Company d/b/a AmerenUE's tariffs to increase its rates for electric service. That Report and Order became effective on June 1. On May 31, the Office of Administration and the Department of Economic Development (the State of Missouri); the Consumers Council of Missouri; the Missouri Industrial Energy Consumers; the Office of the Public Counsel; and AmerenUE filed timely applications for rehearing. AmerenUE filed a response to the other applications for rehearing on June 11. No other responses were filed.

Section 386.500.1, RSMo (2000), indicates the Commission shall grant an application for rehearing if "in its judgment sufficient reason therefor be made to appear." The applications for rehearing restate the positions the parties espoused at the hearing. The Commission rejected those positions in its Report and Order. Each application for rehearing will be denied.

The Commission will, however, address an issue raised in the applications for rehearing to further explain the Commission's decision. The applications for rehearing filed by Public Counsel, the State, the Consumers Council of Missouri, and MIEC, note that the Commission's Report and Order spoke approvingly of the testimony offered by MIEC's expert witness, Michael Gorman, regarding an appropriate return on equity. As indicated in the Report and Order, Gorman's overall recommendation for a return on equity was 9.8 percent, but the Commission found a 10.2 percent return on equity to be appropriate. The requests for rehearing seize upon one sentence of the Report and Order that states Gorman's overall recommendation should be "pushed up a bit in recognition of the Commission's denial of AmerenUE's request for a fuel adjustment clause." Based on that sentence, the parties argue that the Commission arbitrarily and inappropriately added .4 percent to the allowed return on equity for the denial of a fuel adjustment clause.

That argument ignores the bulk of the Commission's explanation for why it found a 10.2 percent return on equity to be appropriate. In fact, as indicated in the Report and Order, the Commission found Gorman's Bond Yield Plus Risk Premium Model and Capital Asset Pricing Model, both indicating an appropriate return on equity of 10.2 percent or greater, to be more reasonable than his DCF analysis that resulted in a recommended

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return on equity of 9.2 percent. Gorman's proxy group for his DCF analysis consisted of 13 comparables, which was smaller and less reliable than the proxy groups suggested by some of the other experts providing return on equity testimony in this case. Thus an upward adjustment to account for manipulation of the proxy group to achieve an artificially low number is appropriate.

Gorman's testimony, in its totality, was and is the most credible of all the testimony offered on the issue; however, it was not without its shortcomings as evidenced above and with regard to the issue of fuel adjustment. Gorman failed to identify which members of his proxy group were already operating with a fuel adjustment clause and what the effect might be on the company if its request for a fuel adjustment mechanism were denied. There is abundant evidence in this proceeding and in other proceedings before this Commission that most vertically-integrated utilities operating in states that are not restructured have fuel adjustment clauses and less risk. When Billie LaConte, the return on equity witness for the Missouri Energy Group, was asked the following question by a Commissioner: "If we did not give AmerenUE a fuel adjustment clause, then what would your recommendation be in order to try not to hurt this company?", she replied: "I would suggest that the Commission allow a small adjustment on the return on equity to reflect that, ...".¹ Accordingly, it is appropriate to compensate companies with additional basis points for assuming that risk and the addition of 40 basis points to Gorman's recommendation is just and reasonable under these circumstances.

More fundamentally, the criticisms of the Commission's return on equity decisions are based on the mistaken assumption that the Commission must accept, without change, a return on equity recommendation suggested by one of the expert witnesses. None of the return on equity experts offering their testimony in this case recommended a return on equity of 10.2 percent, but the Commission is not limited to simply choosing from among the submitted expert recommendations when establishing a return on equity.

Establishing a return on equity is part of the Commission's attempt to establish just and reasonable rates. As the Missouri Court of Appeals has indicated, "[under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling. It is not theory but the impact of the rate order which counts."² For all the reasons

¹ Transcript, Page 2945, Lines 13-18.

² State ex rel. Assoc. Natural Gas Co. v. Pub. Serv. Com'n of Missouri, 706 S.W. 2d 870, 873 (Mo App. W.D. 1985)

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set out in its Report and Order, the Commission has established a return on equity it believes to be just and reasonable. The criticisms of the return on equity allowed by the Commission are without merit and do not justify rehearing.

The State's application for rehearing also raises a matter that can properly be described as a request for clarification rather than a request for rehearing. In criticizing the Commission's decision to establish an annual base level of SO₂ sales of \$5 million, the State points out that while the Commission's decision creates a tracking mechanism to account for sales over and under that \$5 million base level, it does not indicate whether AmerenUE should pay interest to ratepayers for accrued sales over that amount, or collect carrying costs from ratepayers if sales fall below the base level. The Commission's Report and Order is silent on that question and that silence could result in confusion and misunderstandings in a future rate case. Therefore, the Commission will clarify its Report and Order to provide that AmerenUE shall pay interest to ratepayers at its short-term borrowing rate for annual accrued SO₂ sales above a base level of \$5 million and collect carrying costs from ratepayers at the same rate if sales fall below that base level. Interest or carrying costs shall be calculated based on the amount by which the balance in the tracking account varies from the \$5 million baseline established in the Report and Order, on December 31, 2007, and each subsequent December 31, until the Commission issues a final order in AmerenUE's next rate case.

AmerenUE's application also raises a matter for which it seeks clarification. At page 95 of its Report and Order, the Commission addresses an issue defined as "Net Salvage Percentage to be Used for Assets in Account 322." In its decision on this issue, the Commission held that an additional .2 percent should be added to the depreciation rate for Account 322. However, the Commission also found that Staff and AmerenUE's agreement that an additional .1 percent should be added to the depreciation rates for other nuclear plant accounts was not identified as a separate issue and was not supported by any evidence. Therefore, the Commission found that it had no basis for making a decision regarding those accounts.

AmerenUE interpreted the Commission's inability to decide whether an additional .1 percent should be added to the depreciation rates for other nuclear accounts to mean that the net salvage percentages for those accounts must be set at zero. As a result, AmerenUE calculated its rates using zero net salvage percentages for those accounts – specifically accounts 321, 323, 324, and 325. Because net salvage percentages for

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those accounts were set at zero, AmerenUE's allowed revenue requirement was reduced by approximately \$1 million below the revenue requirement contemplated in the Report and Order. The compliance tariffs submitted by AmerenUE and approved by the Commission reflect that lower revenue requirement, although AmerenUE indicates it does not believe the Commission intended that result.

AmerenUE explains that the depreciation rates proposed by Staff in its testimony include net salvage percentages of -3 percent for account 321, -3 percent for account 323, -2 percent for account 324, and -1 percent for account 325. Those net salvage percentages were not challenged by any party and AmerenUE contends the Commission should have ordered it to use those net salvage percentages for those accounts.

AmerenUE is correct. In holding that it lacked sufficient evidence to decide whether to add .1 percent to the net salvage percentages proposed by Staff for accounts 321, 323, 324, and 325, the Commission did not set those net salvage percentages at zero. The net salvage percentages proposed for those accounts by Staff are reasonable and are not opposed by any party. AmerenUE shall use those net salvage percentages when calculating its allowed revenue requirement. AmerenUE may file tariffs to reflect the revised calculations.

AmerenUE also identified three factual errors in the Report and Order that it suggests be corrected nunc pro tunc. First, AmerenUE's legal counsel is identified in the Report and Order as James B. Lowrey. The attorney's last name is in fact spelled Lowery. Second, the Report and Order, at page 9, states that AmerenUE serves approximately 2 million customers in Missouri. In fact, AmerenUE serves approximately 1.2 million Missouri customers. Third, at page 75 of the Report and Order, the Commission indicates it will establish a regulatory tracking mechanism "without including a base amount of SO₂ sales in AmerenUE's revenue requirement." In fact, later in the Report and Order, the Commission included a base amount of \$5 million in the regulatory tracker. All the identified factual errors will be corrected nunc pro tunc.

IT IS ORDERED THAT:

1. The Office of Administration and the Department of Economic Development's (the State of Missouri's) Application for Rehearing is denied.
2. The Consumers Council of Missouri's Application for Rehearing is denied.
3. The Missouri Industrial Energy Consumers' Application for Rehearing is denied.

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4. The Office of the Public Counsel's Application for Rehearing is denied.

5. Union Electric Company d/b/a AmerenUE's Application for Rehearing is denied.

6. The Commission's Report and Order is clarified to provide that AmerenUE shall pay interest to ratepayers at its short-term borrowing rate for annual accrued SO₂ sales above a base level of \$5 million and collect carrying costs from ratepayers at the same rate if sales fall below that base level. Interest or carrying costs shall be calculated based on the amount by which the balance in the tracking account varies from the \$5 million baseline established in the Report and Order, on December 31, 2007, and each subsequent December 31, until the Commission issues a final order in AmerenUE's next rate case.

7. The Commission's Report and Order is clarified to provide that AmerenUE shall use the following net salvage percentages when calculating its allowed revenue requirement:

Account 321	-3%
Account 323	-3%
Account 324	-2%
Account 325	-1%

AmerenUE shall file tariffs to reflect the revised calculations.

8. The following items in the Commission's May 22, 2007 Report and Order are corrected nunc pro tunc:

- a. In the Appearances section of page 1, the name of AmerenUE's attorney is correctly spelled Lowery, not Lowrey;
- b. On page 9, AmerenUE serves approximately 1.2 million Missouri customers, not 2 million; and
- c. On pages 74-75 the following sentence is deleted:
"For those reasons, the Commission finds it in the long-term best interest of ratepayers to establish a regulatory tracking mechanism without including a base amount of SO₂ sales in AmerenUE's revenue requirement."

9. This order shall become effective on July 8, 2007.

Davis, Chm., Murray, Clayton and Appling, CC., concur
Gaw, C., dissents

Woodruff, Deputy Chief Regulatory Law Judge

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In the Matter of the PGA Filing for Laclede Gas Company

Case No. GR-2004-0273

Decided June 28, 2012

Gas § 42. Staff's proposal to disallow \$2,055,864 in costs for first-of-month demand charges for swing supply natural gas incurred by Laclede Gas Company in its 2003-2004 ACA period was rejected after Laclede successfully proved the questioned expenditures to have been prudent.

APPEARANCES

Michael C. Pendergast, Vice President and Associate General Counsel, and **Rick Zucker**, Assistant General Counsel—Regulatory, Laclede Gas Company, 720 Olive Street, St. Louis, Missouri 63101, for Laclede Gas Company.

Marc D. Poston, Senior Public Counsel, Office of the Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Lera L. Shemwell, Senior Counsel, **Steven Reed**, Litigation Counsel, and **Blane Baker**, Legal Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Nancy Dippell, Deputy Chief.

REPORT AND ORDER

Syllabus: This order finds that under the specific facts of this case, Laclede Gas Company was not imprudent in purchasing the right to buy swing supply gas at first-of-month pricing during the 2003-2004 Actual Cost Adjustment (ACA) period. In addition, Laclede Gas Company is directed to adjust its ACA balance.

Procedural History

This case was opened to review the ACA filing of Laclede in order to set the ACA and refund balances with regard to Laclede's Purchased

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Gas Adjustment (PGA) clause. The Staff of the Missouri Public Service Commission reviewed Laclede's actual gas costs and conducted an analysis of its billed revenues for the period October 1, 2003, through September 30, 2004. Staff filed its recommendation on December 29, 2005, in which it requested certain disallowances be made in Laclede's ACA balance. Laclede filed its response on February 27, 2006, in which it disagreed with Staff's disallowances and responded to the recommendations of Staff.

Following some technical conferences and negotiations, Staff filed a notice on August 24, 2006, informing the Commission that parties had resolved all issues with the exception of a disallowance for the purchase of swing supplies at first-of-month (FOM) prices.

Prefiled testimony and prehearing briefs were received, and a hearing was held on January 29, 2007, at which all parties were represented by counsel. The post-hearing briefs were filed on March 5, 2007.

On June 13, 2007, per the Commission's order, Staff filed Staff's Supplemental Recommendation setting out the (over)/under-recovery of ACA and refund balances to be collected from ratepayers as a result of this case. Staff included the balances to be recovered for both the inclusion and disallowance of swing supply demand charges. On June 20, 2007, Laclede responded stating that it had no objection to Staff's calculations as presented in the supplemental recommendation with the exception that the LP Sales balance was incorrect. Staff filed a further response on June 21, 2007, stating its concurrence with Laclede. No response was received from the Office of the Public Counsel.

On February 13, 2007, the Errata Sheet of David Sommerer was received. This Errata Sheet modifies the Deposition of David Sommerer taken on January 18, 2007, received into evidence as Exhibit 11. No objection was received to the Errata Sheet and it is hereby incorporated into Exhibit 11 and admitted into evidence.

The parties identified three primary issues in this case: 1) Was it imprudent of Laclede to purchase the right to buy swing supply gas at first-of-month (FOM) pricing during the 2003-2004 ACA period?; 2) If so, were Laclede's customers harmed by this action?; 3) If customers were harmed, in what amount were they harmed, and what amount of gas costs, if any, should be disallowed to Laclede?

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Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact:

1. Laclede is a Missouri corporation engaged in providing natural gas service in the areas of Missouri certificated to it by the Commission.

2. The ACA period at issue is the period from October 1, 2003, through September 30, 2004.¹

3. Laclede has filed tariff sheets for the 2003-2004 ACA period which were approved by the Commission as interim and subject to refund.

4. In its PGA filings Laclede estimated its gas costs for the upcoming year.

5. In the ACA audit, Staff reconciled the estimated costs with the actual cost of gas to ensure that the claimed costs are properly attributed to the period under review and that the pipelines and natural gas suppliers charged Laclede the correct amounts for the volumes received and under the appropriate contract rates.²

6. Staff also reviewed Laclede's gas purchasing practices to determine the prudence of the purchasing and operating decisions.³

7. Based on its review, Staff recommended, among other things, that Laclede's ACA balance be adjusted by \$2,055,864⁴ for Laclede's swing supply demand charges.

8. Without Staff's proposed disallowance, the parties agree that the following ACA and Refund balances should apply:⁵

	Firm Sales Non-LVTS3	Firm Sales LVTS3	Interruptible Sales	LP Sales	Firm Transportation	Vehicular Fuel	Refund
Ending ACA Balance	\$18,661,505	\$1,032,722	\$(3,604)	\$3,294	\$464,331	\$18,752	\$348,488

¹ Exhibit 1, Sommerer Direct, p. 5.

² Exhibit 1, Sommerer Direct, p. 4.

³ Exhibit 1, Sommerer Direct, p. 5.

⁴ Staff's requested disallowance was originally \$2,424,020, but was amended at the hearing to \$2,055,864. See, Exhibit 10; Transcript p. 38.

⁵ Staff Recommendation, filed December 29, 2005, Staff Notice to the Commission, filed August 24, 2006, Staff's Supplemental Recommendation, filed June 13, 2007, Laclede Gas Company's Response to Staff's Supplemental Recommendation, filed June 20, 2007, and Staff's Correction to Its Supplemental Recommendation, filed June 21, 2007.

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9. "Swing supply" is one of several types of gas supply which Laclede utilizes.⁶

10. Swing supply has great flexibility in that it allows the buyer to order the gas on very quick notice, and allows the buyer to take anywhere from zero volume to the Maximum Daily Quantity.⁷

11. Swing supply is sometimes characterized as peaking supply in that it is only used on colder days.⁸

12. Swing contracts provide Laclede with flexibility to increase or decrease its requests for gas in response to changing weather and customer requirements and for flexibility in managing storage so that Laclede complies with its storage contracts.⁹

13. Natural gas prices are commonly established by a published index.¹⁰

14. A FOM index is established each month and represents a sampling of prices during the last few days of the prior month.¹¹

15. Similar to a FOM index, a daily index is published.¹²

16. Laclede has traditionally used a FOM index for its swing supplies.¹³

17. Laclede consistently paid demand charges in connection with these swing supplies for at least a decade prior to the 2003-2004 ACA period.¹⁴

18. Swing supplies priced at the FOM index also have producer demand charges associated with them.¹⁵

19. A producer demand charge is a fixed charge paid to suppliers for holding natural gas supplies ready to be delivered to the buyer.¹⁶

20. The producer demand charge is paid each month even if no gas is nominated from a contract for that month.¹⁷

⁶ Ex. 1, Sommerer Direct, p. 7.

⁷ Ex. 1, Sommerer Direct, p. 7.

⁸ Ex. 1, Sommerer Direct, p. 7.

⁹ Ex. 1, Sommerer Direct, p. 8.

¹⁰ Ex. 1, Sommerer Direct, p. 6.

¹¹ Ex. 1, Sommerer Direct, p. 7.

¹² Ex. 1, Sommerer Direct, p. 7.

¹³ Ex. 1, Sommerer Direct, p. 8.

¹⁴ Ex. 4, p. 7.

¹⁵ Ex. 1, Sommerer Direct, p. 8.

¹⁶ Ex. 1, Sommerer Direct, p. 8.

¹⁷ Ex. 1, Sommerer Direct, p. 8.

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21. Laclede structured its swing supply contracts for the 2003-2004 ACA period so that it paid the FOM price for all swing supplies bought for a particular month.¹⁸

22. An alternative to FOM pricing is to pay the daily index prices for swing supply.

23. Fixed producer demand charges for daily pricing tend to be less than for FOM pricing.¹⁹

24. The daily index price for gas may be higher or lower than the FOM price depending on the market fluctuations. Overall, daily prices tend to be higher than FOM prices.²⁰

25. In both FOM and daily pricing, the price the local distribution company will eventually pay for the gas is unknown until after the index price is set.²¹

26. Laclede conducted a formal study regarding the 1995-1996 winter heating season with regard to demand charges (the "1995 study").²²

27. The 1995 study contained data for only one heating season.²³

28. The 1995 study as prepared showed that Laclede received a benefit by purchasing gas at the FOM pricing even though demand charges were paid.²⁴

29. This was the only formal study that Laclede conducted with regard to examining demand charges, until after the 2003-2004 ACA period.

30. Laclede did not perform a formal study comparing FOM pricing demand charges to daily pricing demand charges.

31. The 1995 study assumed that demand charges for FOM pricing were the same as those for daily pricing.²⁵

32. The 1995 study did not separate Laclede's gas supplies into base load, combo, and swing supplies.²⁶

33. The 1995 study did not separate the off-system sales costs and revenues from on-system supplies.²⁷

¹⁸ Ex. 1, Sommerer Direct, p. 8.

¹⁹ Ex. 1, Sommerer Direct, p. 9.

²⁰ Transcript, p. 175.

²¹ Ex. 1, Sommerer Direct, p. 4.

²² Transcript, p. 216, l. 19-21 and Exhibit 18.

²³ Transcript, p. 216, l. 19-21 and Exhibit 18.

²⁴ Godat Direct, p. 8.

²⁵ Exhibit 18.

²⁶ See, *Staff's Post-Hearing Brief*, p. 3.

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34. Laclede made no attempt to try to determine the amount of swing supplies that went to off-system sales in the preceding years.²⁸

35. The 1995 study does not consider the current cost of demand charges when planning gas supplies and only considers the historical information.

36. Laclede did not consider how high demand charges should go before a decision to alter purchasing practices should be made.²⁹

37. Laclede did not formally analyze its use of storage to avoid daily price spikes while purchasing swing gas at daily prices.³⁰

38. If Laclede had performed a formal study immediately prior to the 2003-2004 ACA period, it would have shown that paying FOM prices had saved ratepayers \$7,922,753 in 2000-2001 and \$12,235,265 in 2002-2003.³¹

39. Laclede considered the 1995 study but did not rely heavily on it when making decisions in 2003.³²

40. Demand charges were paid by Laclede for swing supply contracts for the months of November 2003 through April 2004.³³

41. Total producer demand charges for the 2002-2003 ACA period were approximately \$11.9 million.³⁴

42. Total producer demand charges for the 2003-2004 ACA period were \$20,291,999.³⁵

43. Staff's witness David Sommerer's testimony that the producer demand charges had "nearly doubled" is an exaggeration.³⁶

44. George Godat has a Bachelor of Science degree in mechanical engineering from the University of Missouri-Rolla, and has worked for Laclede since January of 1992. He was promoted to Distribution Engineer in 1994 and further promoted to Gas Supply Administrator in 1996. He was promoted to Senior Gas Supply Administrator in 1998 and became Manager of Energy Services in October 2001. He was promoted to the position of Director of Gas Supply in October of 2003 and is responsible

²⁷ Transcript, p. 223, l. 16-18.

²⁸ Transcript, p. 224, l. 3-8.

²⁹ Transcript, p. 213-214.

³⁰ Transcript, p. 180.

³¹ Exhibit 19.

³² Transcript, p. 215.

³³ Transcript, p. 195.

³⁴ Sommerer Rebuttal, p. 4, ln.8; Exhibit 17.

³⁵ Sommerer Rebuttal, p. 4, ln.8; Exhibit 11, p. 6, lns. 16-20; Exhibit 17.

³⁶ Sommerer Rebuttal, p. 4-6.

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for directing most of the day-to-day gas supply purchasing, sales, risk management and accounting functions for Laclede.³⁷

45. Mr. Godat was the primary person responsible for the gas supply analysis during the 2003-2004 ACA period.³⁸

46. Even though this was the first year he undertook the primary responsibility for gas supply purchasing, Mr. Godat had sufficient experience and knowledge to perform these functions.

47. In September 2003, before entering into swing contracts, Laclede sent out Request for Proposals (RFPs), a competitive bidding process.

48. When the RFPs were received by Laclede, it knew that total producer demand charges had risen significantly from the 2002-2003 to the 2003-2004 heating season.³⁹

49. Laclede did not reissue its RFPs to request daily pricing.
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50. Daily demand charges for the 2003-2004 swing supply would have cost \$524,271.⁴¹

51. FOM swing supply demand charges cost \$4,194,169 for the 2003-2004 ACA period.⁴²

52. Commodity savings for the 2003-2004 ACA period were \$1,614,034⁴³ for FOM pricing compared to daily pricing.⁴⁴

53. Total gas cost for Laclede for the 2003-2004 ACA period was \$518,310,337.⁴⁵

54. Demand charges for the 2003-2004 ACA period comprised about 4% of Laclede's total gas costs.⁴⁶

55. Swing demand charges for the 2003-2004 ACA period were approximately 20% of the total cost of swing gas.⁴⁷

³⁷ Exhibit 4, Godat Direct, p. 1, Ins. 9-18.

³⁸ Transcript, p. 192, Ins. 21-22.

³⁹ Transcript, p. 208; Exhibit 17.

⁴⁰ Transcript, p. 193, l. 21-23.

⁴¹ Exhibit 10.

⁴² Transcript, p. 229, l. 24 – p. 230, l. 16; Exhibit 10.

⁴³ This amount was calculated using the daily price on the first of the month and not the actual daily price.

⁴⁴ Exhibit 10.

⁴⁵ Transcript, p. 45.

⁴⁶ Transcript, p. 172, Ins. 5-8.

⁴⁷ Transcript, p. 172, l. 5-13.

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56. The Public Service Commission Natural Gas Task Force stated in its 2001 final report that demand charges under 5% of gas costs were reasonable.⁴⁸

57. The total volume of swing gas contracted in the 2003-2004 period was less than the volumes contracted in 2002-2003 but Laclede paid approximately \$600,000 more in swing demand charges in the 2003-2004 period.⁴⁹

58. Demand charges for the 2003-2004 swing supply increased approximately 30% from the year before.⁵⁰

59. Total demand charges for 2003-2004 increased by approximately 70% from the year before.⁵¹

60. The Stipulation and Agreement and the On-the-Record Presentation in GR-2002-356 (the 2002 rate case) did not limit the Commission with regard to prudence reviews.⁵²

61. The winter of 2002-2003 had "normal" temperatures; however, given that the previous years had been warmer than normal, demand for gas was high.⁵³

62. As recently as February 2003, Laclede had seen huge intra-month price spikes in the natural gas markets⁵⁴ and record low storage levels that threatened to drive prices even higher.⁵⁵

63. The temperatures during the winter of 2003-2004 were warmer than normal.⁵⁶

64. The Commission Staff sent a letter to local distribution companies (LDCs) in the summer of 2003. In the letter the Staff requested that LDCs provide information regarding their storage and hedging strategies.⁵⁷

65. The Staff has not recommended that any other LDC perform a study to determine if paying daily demand charges is more economical than paying FOM demand charges. In addition, Staff has never performed such a study.⁵⁸

⁴⁸ Transcript, Ins. 12-23.

⁴⁹ Transcript p. 67, line 11 to Transcript p. 68, l. 20; Transcript, p. 173, l. 18-25.

⁵⁰ Ex. 1, Schedule 2-11; Transcript p. 43, l. 20-22.

⁵¹ Transcript, p. 43.

⁵² Transcript, p. 123-124.

⁵³ Transcript, p. 246.

⁵⁴ Ex. 4, p. 8.

⁵⁵ Transcript, pp. 215, 243, and 246.

⁵⁶ Transcript, pp. 76 and 78.

⁵⁷ Ex. 11, pp. 68-70.

⁵⁸ Ex. 11.

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66. The ratepayers receive a benefit in the form of some price stability by having FOM prices instead of daily prices, especially in situations where the daily prices are spiking erratically.⁵⁹

67. Natural gas prices increased from \$2 per MMBtu to as much as \$15 per MMBtu in the ten years prior to February of 2006, according to a report of the Commission issued on February 7, 2006.⁶⁰

68. Laclede and the entire natural gas industry had experienced extraordinary intra-month price spikes during the later part of the 2002-2003 ACA period.⁶¹

69. In Laclede's 2002 rate case, GR-2002-0356, the approved Partial Stipulation and Agreement required a \$3.8 million imputation to ratepayers for capacity release and off-system sales.⁶²

70. In the 2003-2004 ACA period, customers paid \$4.2 million for swing demand charges and received \$2-to-2.5 million in revenue imputation from off-system sales.⁶³

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

Jurisdiction

Laclede is an investor-owned public utility engaged in the provision of natural gas service in the state of Missouri. Laclede is, therefore, a "gas corporation" as defined in Section 386.020(18), RSMo 2000. As a "gas corporation," Laclede is subject to the jurisdiction of the Commission under Chapters 386 and 393, RSMo 2000.

Burden of Proof

Section 393.130.1, RSMo 2000, requires that all charges made or demanded by any gas corporation must be just and reasonable. Section 393.150.2, RSMo 2000, provides that in any hearing involving a rate increase, the gas corporation proposing such rate increase has the burden of proving that the proposed increased rate is just and reasonable. The Commission has also held that the gas corporation has the burden of

⁵⁹ Ex. 11, p. 62.

⁶⁰ Transcript, pp. 74-75.

⁶¹ Ex. 11, pp. 30 and 45-46.

⁶² Sommerer Rebuttal, p. 6; Exhibit 12.

⁶³ Transcript, p. 164, l. 1-5.

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showing that the gas cost that it proposes to pass on to ratepayers through operation of its PGA tariff is just and reasonable.⁶⁴

The Prudence Standard

It is not, however, sufficient to state that Laclede, as the gas corporation, has the burden of proving that its gas costs are just and reasonable. The fact that Staff is challenging the prudence of incurring some of those costs brings into effect an additional standard, the prudence standard. The Commission established its prudence standard in a 1985 case involving the costs incurred by Union Electric Company in constructing its Callaway nuclear plant.⁶⁵ In determining how much of those costs were to be included in Union Electric's rate base, the Commission adopted a standard for determining the prudence of costs that had been established by the United States Court of Appeals, District of Columbia, in a 1981 case.⁶⁶

The standard adopted by the Commission recognizes that a utility's costs are presumed to be prudently incurred, and that a utility need not demonstrate in its case-in-chief that all expenditures are prudent. "However, where some other participant in the proceeding creates a serious doubt as to the prudence of an expenditure, then the applicant has the burden of dispelling those doubts and proving the questioned expenditures to have been prudent."⁶⁷

The Commission, in the *Union Electric* case, further established that the prudence standard was not based on hindsight, but upon a reasonableness standard. The Commission cited with approval a statement of the New York Public Service Commission that:

... the company's conduct should be judged by asking whether the conduct was reasonable at the time, under all the circumstances, considering that the company had to solve its problem prospectively rather than in reliance on hindsight. In effect, our responsibility is to determine how

⁶⁴ In the Matter of Tariffs filed by Western Resources, Inc., d/b/a Gas Service, a Western Resources Company, to Reflect Rate Changes to be Reviewed in the Company's 1992-1993 Actual Cost Adjustment, 3 Mo. P.S.C. 3d 480, 488 (1995).

⁶⁵ In the Matter of the Determination of In-Service Criteria for the Union Electric Company's Callaway Nuclear Plant and Callaway Rate Base and Related Issues. In the Matter of Union Electric Company of St. Louis, Missouri, for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in the Missouri Service Area of the Company, 27 Mo. P.S.C. (N.S.) 183, 192-193 (1985).

⁶⁶ *Anaheim, Riverside, Etc. v. Fed. Energy Reg. Com'n*, 669 F.2d 799, 809 (D.C. Cir. 1981).

⁶⁷ *Union Electric*, 27 Mo. P.S.C. (N.S.) 183, 193 (1985).

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reasonable people would have performed the tasks that confronted the company.⁶⁸

Since its adoption, the Commission's prudence standard has been recognized by reviewing courts.⁶⁹

In the *Union Electric* case, the Commission found that the showing of \$2 billion in cost overruns associated with the building of the Callaway nuclear plant was sufficient to raise serious doubts about the prudence of Union Electric's expenditures, thus shifting the burden to Union Electric to show that its expenditures were prudent. In this case, Staff raises serious doubts about the prudence of Laclede's expenditures for the purchase of its swing supplies at FOM pricing. Staff showed that Laclede could have paid \$3,669,898 less for demand charges had it purchased its swing supplies at daily prices instead of FOM prices. Staff successfully raised serious doubts about the prudence of paying these charges. This could have resulted in an overall savings to the ratepayer of \$2,055,864. Therefore, the burden shifted to Laclede to prove that its payment of FOM demand charges was prudent.

The Stipulation and Agreement in GR-2002-356

Laclede argues that the Stipulation and Agreement in its previous rate case, GR-2002-0356, precluded the Commission from reviewing the FOM demand charges for prudence. The Stipulation and Agreement clearly contemplated that prudence reviews would be made with regard to how the off-system sales and capacity release transactions were to be handled⁷⁰ and does not preclude this review.

The Hedging Rule

The Commission's hedging rule recognizes that it is prudent to use hedging instruments even though they may result in prices that are occasionally above the spot market price for gas.⁷¹

Decision

The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant

⁶⁸ *Union Electric*, at 194, quoting *Consolidated Edison Company of New York, Inc.*, 45 P.U.R. 4th 331 (1982).

⁶⁹ See, e.g., *State ex rel. Associated Natural Gas Company v. Pub. Serv. Com'n*, 954 S.W.2d 520, 529 (Mo. App. W.D. 1997).

⁷⁰ Ex. 12.

⁷¹ 4 CSR 240-40-018.

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evidence, but indicates rather that the omitted material was not dispositive of this decision. After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decision.

The initial burden is on those challenging the prudence of Laclede's decisions to raise serious doubts about their prudence. Staff showed that Laclede should have recognized that demand charges for swing supply were increasing more drastically than other demand charges. Laclede did not know whether FOM pricing was the most economical way to purchase swing supply, because it had only compared FOM pricing to daily pricing for all supply. Had it compared the cost of only the swing supply demand charges, Laclede would have been alerted to the need to look at other alternatives and it would have issued new RFPs with a request for the daily pricing demand charges.⁷²

Second, Staff raised doubts about Laclede's prudence by showing that Laclede had not considered the impact of the demand charges on the ratepayers, but rather, only looked at the demand charges as a whole. Clearly, in conducting its one and only study in 1995 regarding the cost of demand charges, Laclede only considered the overall effect on the company (that is, the shareholders) of the demand charges. Laclede did not exclude off-system sales, with or without the imputed amount, to see if FOM pricing would have benefited the ratepayers or the shareholders.

Because Staff created serious doubts as to the prudence of Laclede's decision, the burden to show that paying the FOM demand charges were prudent shifts back to Laclede. To determine whether Laclede's decision was prudent, the Commission must be careful not to use hindsight. The Commission must look at the facts which Laclede knew or should have known at the time the decisions were made and determine if those decisions were reasonable under the circumstances.

Laclede's decision to purchase the right to buy swing supplies at FOM pricing during the ACA period was an integral, longstanding, and effective component of its overall gas purchasing strategy. Laclede had consistently paid demand charges in connection with these swing supplies for at least a decade prior to the 2003-2004 ACA period.⁷³ Further, Staff, after nearly a decade of ACA reviews, management audits, and other proceedings in which it had the opportunity to question the propriety of this practice, had not questioned it. Nor had Staff questioned any other company as to its failure to analyze their method of paying demand charges

⁷² Transcript, p. 193, l. 21-23.

⁷³ Ex. 4, p. 7.

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for swing supply (e.g., to determine whether FOM pricing would have been more advantageous than daily demand charges). In fact, Staff sent the opposite message in the years immediately preceding the ACA period, by sending letters and reports emphasizing the potential for higher and even more volatile gas prices and the need to pursue measures aimed at mitigating the effect of such prices on utility customers.

Purchasing swing supplies at FOM prices gives some benefits to ratepayers. It protects ratepayers from daily, intra-month price spikes, caused by cold weather or other factors, since Laclede is able to buy needed swing supplies at the lower FOM price under these circumstances. This helps to stabilize the price of gas.

Under the circumstances in which Laclede was purchasing these gas supplies, Laclede did not believe that demand charges were escalating in any unusual or unexpected way considering what was happening with other natural gas pricing mechanisms. Laclede's experienced personnel looked at the shortfall in storage inventories at the national level, took note of the extraordinary intra-month price spikes that had been experienced during the later part of the 2002-2003 ACA period, examined forward prices and, with a detailed knowledge of how cold weather and increased price volatility could have affected Laclede's gas costs, determined that it was reasonable to pay the increase in demand charges.⁷⁴ Even if Laclede had issued additional RFPs and found that demand charges for daily prices were significantly less, a reasonable person in the same circumstance would have made the same decision as Laclede.

Laclede argues that if it had suddenly abandoned its decade-long practice of paying FOM demand charges, it is likely that Staff would have argued *that* decision was imprudent. The Commission agrees. This is especially true if the weather had been normal or colder than normal instead of warmer than normal, causing prices to spike like they had in two of the previous three winters. Even with the warmer than normal weather, the actual cost of gas was \$1,614,034⁷⁵ less at FOM prices than at daily prices.

The Commission determines that Laclede has met its burden of proving that under similar circumstances, even if Laclede had issued further RFPs and analyzed the impact on the ratepayers, it was prudent in this instance to continue with its longstanding practice in order to avoid intra-month price spikes. Laclede has proven that its decision to purchase

⁷⁴ Ex. 6, p. 7; Transcript p. 205.

⁷⁵ Ex. 10.

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swing supplies at FOM pricing, and therefore incurring FOM demand charges for this particular year, was prudent. Because the Commission determined that Laclede's decision was prudent, the Commission need not determine if customers were harmed or by how much they may have been harmed by Laclede's decision.

After reviewing all of the evidence, including the Staff's recommendation and the supplemental recommendation, the Commission determines that the ending balances without Staff's disallowance as shown above are reasonable and will be approved. The Commission shall direct Laclede to establish new ACA balances as set out below.

IT IS ORDERED THAT:

1. Staff's proposal to disallow \$2,055,864 in costs for first-of-month demand charges for swing supply natural gas incurred by Laclede Gas Company in its 2003-2004 ACA period is rejected.

2. Laclede Gas Company shall adjust the ACA account balances in its next ACA filing to reflect the (over)/under-recovered ACA and Refund balances as follows:

	Firm Sales Non-LVTSS	Firm Sales LVTSS	Interruptible Sales	LP Sales	Firm Transportation	Vehicular Fuel	Refund
Ending ACA Balance	\$18,661,505	\$ 1,032,722	\$ (3,604)	\$ 3,294	\$464,331	\$ 18,752	\$348,488

3. Any pending motions or objections that the Commission has not specifically ruled upon are hereby denied or overruled.

4. This Report and Order shall become effective on July 8, 2007.

Davis, Chm., Murray, and Appling, CC.,
concur;
Gaw and Clayton, CC., dissent;
and certify compliance with the provisions
of Section 536.080, RSMo.

DISSENTING OPINION OF COMMISSIONERS STEVE GAW AND ROBERT M. CLAYTON III

These Commissioners dissent from the majority opinion which rejects Staff's efforts at holding Laclede to an appropriate standard in gas purchasing practices. The majority opinion endorses Laclede's past decision-making as prudent and fails to penalize the company in its

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Purchased Gas Adjustment filing, resulting in customers paying higher rates for the utility's imprudent decisions. The Commission should have heeded Staff's recommendations and disallowed a significant pass-through amount to protect consumers.

In recent years, parties have gone before the Legislature and before the Commission confidently proclaiming the PSC Staff's ability to evaluate decisions for prudence. Rather than encouraging that level of Staff review and analysis, the majority, once again, discourages the Staff from pursuing prudence complaints. The facts of this case suggest a need for a thorough investigation into whether a company's gas purchasing prices are prudent. The majority has rejected Staff's efforts on multiple occasions. This rejection will result in less confidence in the PGA process and higher natural gas commodity prices.

Laclede's natural gas needs and supplies can be characterized into base load, swing and combination supplies. The gas purchases involved in this PGA filing were based in part on a study from 1996, which suggested a certain method of gas purchasing for swing supplies of natural gas. The conclusion of that study led Laclede to issue Requests For Proposals (RFPs) for a single method of swing supply gas purchasing. The RFPs returned with proposals for First Of the Month (FOM) gas purchases where prices would be set during a bid week in the month and the price would stay the same until the following month. In fulfilling the contracts, Laclede would pay for both the commodity price of the gas plus demand charges. There are several alternatives to FOM pricing including daily pricing.

Laclede's study was conducted in 1996. Further, apparently Staff was not made aware of the study until later PGA filings. The Staff suggested in its filings and at hearing that as a result of FOM pricing, consumers would be expected to pay over \$2 million more in rates than if Laclede had used daily pricing for its swing supply natural gas needs.

First of all, Laclede should be held to a higher standard when using past research to support current decisions. Laclede relied on a flawed procurement study and made its swing supply purchasing decisions based on tradition and the status quo rather than aggressively reviewing market conditions and adjusting accordingly. The case involves the PGA filings from 2003-4 in which demand charges in FOM pricing exceeded what demand charges would have been under daily pricing. For earlier years, Laclede failed to notice that FOM pricing for swing supplies caused higher rates in 1999, 2000 and 2001. If Laclede would have considered issuing RFPs for daily pricing as well as FOM pricing, savings would have resulted from the broad request for proposals offering more purchasing options.

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Laclede's mistake was not asking the right questions in the planning process, which left no options in making the purchases.

The majority further argues the planning process was prudent because this method of pricing (FOM) had been used for a decade and that Staff took no action contrary to the practice during this time. Further, Staff does not have the burden to prove that rates are "just and reasonable;" Laclede carries that burden. The Commission has, again, sent a message to Staff that it will have to carry the burden when arguing for such a disallowance despite not having access to the necessary information or only receiving it late in the process. If Laclede had acted prudently, it would have made prompt changes in light of market conditions in its plans to protect consumers.

The majority also suggests that FOM pricing allegedly protects against future volatility in prices and that protection may by itself make Laclede's decision prudent. As stated earlier, the best course of action would have been for Laclede to issue multiple RFPs for comparisons of various purchasing methods. However, FOM pricing is not a guaranteed method of purchasing to protect against spikes. If prices during the bid week spike at a high level, the company ends up paying the higher prices for a whole month. In addition, even if daily pricing proves more volatile or expensive than FOM pricing, that calculation disregards a company's ability to use stored gas or other financial instruments to cushion daily gas spikes.

Lastly, the majority relies upon a general assertion of what a reasonable and experienced company would do under the circumstances. According to the majority, Laclede adequately reviewed market conditions like the presence of volatile prices, the presence of storage shortfalls and the relationship between gas costs to cold weather and price volatility. The majority argues that this review process makes the results prudent. However, Laclede failed to be aware of a number of facts and failed to ask a number of questions that should be considered by a reasonable or experienced gas utility. During the hearing, Laclede admitted being unaware of certain percentages involving gas supplies in their use for native load versus off-system sales. Laclede didn't consider the difference in swing supply demand charges when comparing FOM and daily pricing. Laclede wasn't aware of the significance of demand charges within the total price of natural gas supplies. Most importantly, Laclede failed to identify the trends in increasing natural gas prices, including increased demand charges and commodity prices, between 1996 and 2003.

The Commission stands between the consumer and the company; it has been assured in various cases and venues that the Commission will

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actively protect rate payers when utilities make imprudent decisions. Whether one is discussing prudence in PGA filings or fuel adjustment clauses, parties in the past have confidently asserted Staff's expertise in evaluating prudence and taking responsive action. Once again, the majority dismisses Staff's attempts to highlight imprudent behavior. The result is that Staff will ignore imprudence in PGA cases and utilities will be held to a lower standard leading to higher prices for consumers. The Commission's decision will only discourage Staff from closely scrutinizing the prudence of the companies' gas purchasing decisions at a time of record-high gas prices.

For the foregoing reasons, these Commissioners dissent.

In the Matter of the Request of the Staff of the Missouri Public Service Commission for an Order Directing the General Counsel to Petition the Circuit Court of Cole County for the Appointment of a Receiver for Rogue Creek Utilities, Inc., and for the Appointment of an Interim Receiver

*Case No. WO-2007-0344
Decided July 10, 2007*

Evidence, Practice and Procedure §23. If a respondent fails to timely respond to a complaint, the Commission may deem the complaint admitted, and may enter an order granting default.

Service §1. Upon learning that a utility may soon be unwilling or unable to provide safe and adequate service, the Staff of the Commission may ask the Commission for authority to petition the circuit court for an order attaching the utility's assets, as well as for authority to petition the circuit court for an order placing the utility under the control of a receiver.

Service §43. Upon learning that a utility may soon be unwilling or unable to provide safe and adequate service, the Staff of the Commission may ask the Commission for authority to petition the circuit court for an order attaching the utility's assets, as well as for authority to petition the circuit court for an order placing the utility under the control of a receiver.

Water §10. Upon learning that a utility may soon be unwilling or unable to provide safe and adequate service, the Staff of the Commission may ask the Commission for authority to petition the circuit court for an order attaching the utility's assets, as well as for authority to petition the circuit court for an order placing the utility under the control of a receiver.

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**ORDER GRANTING DEFAULT AGAINST ROGUE CREEK UTILITIES,
INC., AND ORDER APPROVING STIPULATION AND AGREEMENT
AMONG NON-DEFAULTING PARTIES**

Syllabus: This order finds Rogue Creek Utilities in default, and approves a Stipulation and Agreement among the remaining parties.

On March 21, 2007, the Staff of the Commission filed the above-captioned complaint against Rogue Creek Utilities, Inc. Staff alleged that Rogue Creek regularly provides water and sewer service to fewer than eight thousand customers, and that Rogue Creek would soon be unwilling or unable to provide safe and adequate service due to the deteriorating health of its sole owner and director, William J. Rummel.

Staff asked for an order finding that Rogue Creek is now, or will soon be, unable to provide safe and adequate service. Further, Staff asked the Commission for authority to petition the Circuit Court of Cole County for an order attaching the assets of Rogue Creek, and to place that company under the control and responsibility of a receiver. Noting that Mr. Rummel has handed day-to-day operations of Rogue Creek to Rita and Joe Coleman, Staff asked that the Commission appoint Rita Coleman as an interim receiver, and that she be compensated from Rogue Creek's assets in an amount to be determined by the Commission. Furthermore, Staff asked the Commission for authority to seek a finding from the circuit court that control and responsibility for the company should not be returned to Mr. Rummel, and that the assets of the company should instead be liquidated in the manner provided by law.

Rogue Creek

On March 22, the Commission issued a Notice of Complaint that informed Rogue Creek and Mr. Rummel of Staff's application, and directed them to respond no later than April 23. The Notice of Complaint was delivered to Rogue Creek and Mr. Rummel by certified mail, return receipt requested, on or about March 27.

Mr. Rummel filed a timely answer, admitting virtually all of Staff's allegations. However, in that answer, Mr. Rummel's counsel explicitly stated that the answer was limited to Mr. Rummel personally, and did not include Rogue Creek. On June 11, Staff filed a Motion for Order Finding Rogue Creek in default. Rogue Creek failed to respond to Staff's motion.

Commission Rule 4 CSR 240-2.070(9) provides that if a respondent fails to timely respond to a complaint, the Commission may deem the

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complaint admitted, and may enter an order granting default.¹ Rogue Creek has failed to respond to Staff's petition. Therefore, the Commission finds that Rogue Creek is in default and that Staff's allegations against Rogue Creek are admitted.

Stipulation and Agreement

Also on June 11, Staff, the Office of the Public Counsel, William J. Rummel, Joe Coleman and Rita Coleman filed a stipulation and agreement. In that stipulation, the parties agree that Rogue Creek regularly provides water and sewer service to fewer than eight thousand customers, and that it would soon be unwilling or unable to provide safe and adequate service due to the deteriorating health of its sole owner and director, William J. Rummel. Moreover, they agree that appointment of a receiver is necessary, and they agree to recommend that control and responsibility for the company should not be returned to Mr. Rummel, but that Rogue Creek should instead be liquidated in the manner provided by law.

Further, the parties agree that Joe Coleman should be the interim receiver, and that he should receive \$1,000 per month from Rogue Creek as compensation, provided that all other direct operating and maintenance expenses are paid first. Also, the parties consent to Staff filing a petition in the Circuit Court of Cole County, in which Staff will ask the court to appoint Joe Coleman as receiver. Finally, so long as Staff seeks relief against Rogue Creek alone, and not against Mr. Rummel personally, Mr. Rummel agrees that he will not oppose Staff's circuit court petition.

The Commission has reviewed the stipulation and agreement, finds it to be a lawful and reasonable resolution of the issues, and will approve it.

IT IS ORDERED THAT:

1. Default is hereby entered against Rogue Creek Utilities, Inc., and Staff's allegations against Rogue Creek Utilities, Inc., are deemed admitted.
2. The Stipulation and Agreement filed by the Staff of the Commission, the Office of the Public Counsel, Rita Coleman, Joe Coleman, and William J. Rummel on June 11, 2007, is approved, and those parties are ordered to abide by their stipulation.

¹ That rule also allows the Commission to set aside a default order if the respondent files a motion to set aside the order within 7 days of the issue date of the order granting default, and if the Commission finds good cause for the respondent's failure to timely respond to the complaint.

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3. The General Counsel of the Commission is directed to petition the Circuit Court of Cole County for an order attaching the assets of Rogue Creek Utilities, Inc., and placing that company under the control and responsibility of a receiver, and that Staff shall recommend that the Circuit Court of Cole County appoint Joe Coleman as the receiver.

4. The General Counsel of the Commission is directed to seek a finding from the Circuit Court of Cole County that control and responsibility for Rogue Creek Utilities, Inc., should not, in the best interest of the company's customers, be returned to the owner of the company and that the receiver should be directed to liquidate the assets of the company in the manner provided by law.

5. Joe Coleman is appointed as interim receiver for Rogue Creek Utilities, Inc., and Joe Coleman shall receive \$1,000 per month during his tenure as interim receiver, provided that all other direct operating and maintenance expenses are paid first.

6. This order shall become effective on July 20, 2007.

7. This case shall be closed on July 21, 2007.

Davis, Chm., Murray, Gaw, Clayton,
and Appling, CC., concur.

Pridgin, Senior Regulatory Law Judge

**In the Matter of the Review of the Competitive Classification of the
Exchanges of Southwestern Bell Telephone, L.P., d/b/a AT&T
Missouri.**

Case No. TO-2007-0053

Decided July 12, 2007

Telecommunications §40. The Commission ordered that each of Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri's exchanges in which competitive classification was granted in Commission Case Nos. TO-2006-0093 and TO-2006-0102 shall continue to be designated as competitive.

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APPEARANCES

William K. Haas, Deputy General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

Paul G. Lane, General Counsel-Missouri, **Leo J. Bub**, Senior Counsel, and **Timothy P. Leahy**, Counsel, Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri, One AT&T Center, Room 3518, St. Louis, Missouri 63101, for Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri.

Michael F. Dandino, Deputy Public Counsel, Office of the Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

REGULATORY LAW JUDGE: Nancy Dippell, Deputy Chief Regulatory Law Judge.

REPORT AND ORDER

Syllabus: This order finds that the conditions in Subsection 392.245.5, RSMo, for competitive classification continue to exist in each exchange which has previously been designated as competitive.

Procedural History

This case began when the Staff of the Missouri Public Service Commission filed a report on August 8, 2006, after an investigation of the competitive classification of Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri's exchanges. The review was implemented under Subsection 392.245.5, RSMo,¹ after Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri, raised its basic local rates in some of its exchanges.

The Office of the Public Counsel filed a request for local public hearings and a request for an evidentiary hearing. The request for local hearings was denied. An evidentiary hearing was held March 8-9, 2007, and briefs were submitted April 18, 2007.

¹ All statutory references are to the Missouri Revised Statutes 2006 Cumulative Supplement unless otherwise indicated.

Pending Motions and Exhibits

During the evidentiary hearing, the Commission requested several exhibits be submitted. The parties were given an opportunity to file any objections to those exhibits. Staff presented late-filed exhibits, Exhibits 9HC, 9NP, 10HC, 10NP, 11HC, 11NP, 12HC, and 12NP, at the Commission's request showing the specific line counts in each exchange, for each CLEC, as well as for AT&T Missouri. No objections were received and those exhibits are admitted into evidence.

Also during the evidentiary hearing, Staff's Exhibit 14 was admitted into evidence with the caveat that AT&T Missouri was allowed to file any objections to the actual figures once it had an opportunity to review them. AT&T Missouri filed corrections to Exhibit 14, which were received without objection. On the third, fourth, and fifth lines of Staff's spreadsheet, under the dates 7/19/2004, 6/14/2004, and 5/21/2004, AT&T indicated that the rate for Speed Calling 8 should be \$3.75. Staff filed a Revised Exhibit 14 showing the corrected vertical services rates. No one objected to the revised exhibit. Revised Exhibit 14 is admitted into evidence and substituted for the original Exhibit 14.

The record was also left open for the filing of Exhibit 17 by Staff. Exhibit 17 is a compilation of information showing the change in AT&T's prices for non-basic services from 1999 to 2001. No objection to Exhibit 17 was received; however, Public Counsel filed a supplement to that exhibit. Public Counsel filed the source documents from Case Nos. TO-2001-467 and TO-2005-0035 showing the non-basic services rate changes from 1996 to 2004. Public Counsel asked to supplement Exhibit 17 with this information. No objection was received to Public Counsel's filing. The Commission will admit Exhibit 17 as submitted by Staff. In addition, the Commission will admit Public Counsel's Supplement to Exhibit 17.

In addition, the parties stipulated in their *Joint Motion to Establish Procedural Schedule*, filed on October 5, 2006, that the *Staff Report* filed on August 8, 2006, could be admitted into evidence. The parties later clarified his stipulation at the evidentiary hearing.² Therefore, the Commission admits the *Staff Report* into evidence.

² Transcript, pp. 302-303.

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Finally, when Staff made its original recommendation in this case it requested that the Commission direct it to complete a review of each competitive exchange on an annual basis. The Commission will authorize its Staff to conduct an investigation of each competitively classified exchange at least as frequently as required by statute. Furthermore, the Commission authorizes its Staff to conduct an annual review if, in Staff's discretion, that is the most administratively efficient manner of complying with the statutory requirements.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact:

1. AT&T Missouri is engaged in providing basic local telecommunications service as an incumbent carrier in the areas of Missouri certificated to it by the Commission.

2. In Commission Case No. TO-2006-0093, effective September 29, 2005, the Commission granted AT&T Missouri competitive classification under the "30-day track" of Subsection 392.245.5, RSMo, for business services in 45 exchanges and for residential services in 26 exchanges.³

3. In Commission Case No. TO-2006-0102, effective October 29, 2005, the Commission granted AT&T Missouri competitive classification under the "60-day track" of Subsection 392.245.5, RSMo, for business services in 30 exchanges and for residential services in 51 exchanges.⁴

4. During the hearing in Case No. TO-2005-0035, AT&T Regulatory Executive Director, Craig Unruh, testified that AT&T Missouri had no plans to increase rates in conjunction with the reclassification of exchanges.⁵

5. In Tariff File No. JI-2006-0638, filed on February 21, 2006, and Tariff File No. JI-2007-0011, filed on July 11, 2006, AT&T

³ The 30-day track business and residential exchanges are set out in the table attached to this Report and Order as Attachment A.

⁴ The 60-day track business and residential exchanges are set out in the table attached to this Report and Order as Attachment A.

⁵ Meisenheimer Direct, Exhibit 3, pp. 15-16, citing to the Transcript, p. 561 in TO-2005-0035 (In the Matter of the Second Investigation into the State of Competition in the Exchanges of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri).

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Missouri increased the monthly rates for business and residential services in its Rate Group B and larger competitively classified exchanges.⁶

6. The increase was one dollar for all business services rate groups and varied for residential services rate groups from 4.8% to 19%.⁷

7. AT&T Missouri decreased basic local service rates in September 2005 by 1.95% in its price cap regulated exchanges as required by statute to reflect the reduction in the Consumer Price Index for Telecommunications Service (CPI-TS).⁸

8. AT&T Missouri also increased rates for unbundled non-basic services, such as customer calling features, local operator services, and payphone services by about 5% after the competitive status was granted.⁹

9. Staff began its review because of the increase in basic local rates. Even though not every exchange had a rate increase, Staff analyzed every exchange classified as competitive in the Commission Case Nos. TO-2006-0093 (30-day proceeding) and TO-2006-0102 (60-day proceeding) in order to simplify the administrative burdens under the statute.

10. Staff used 2005 annual reports of the competitive local exchange carriers to determine how many lines were being served.

11. Annual reports from 2004 had been used as supporting evidence when competitive status in the exchanges was granted.

12. The number of providers shown on Schedules 3 and 4 of Mr. Van Eschen's Rebuttal Testimony are somewhat different than the number of providers listed in Exhibits 9HC through 12HC. Because the latter exhibits are more detailed, showing CLEC-specific line counts and distinguishing facilities-based carriers from "other resale" carriers for both 2004 and 2005, the Commission finds that these exhibits are the most reliable and finds that the CLECs identified by Staff in each exchange are as set out in Exhibits 9HC, 10HC, 11HC, and 12HC. The line counts for 2005 in the two sets of exhibits are the same.

13. The number of facilities-based CLECs and "other resale" CLECs proven to exist by Staff for each exchange is as shown in Attachment A.

14. The 2005 annual report data shows that, with the exception of the Marble Hill and Fulton exchange for business services and

⁶ Meisenheimer Direct, Exhibit 3, pp. 6-7; *Staff Report* (filed August 8, 2006), para. 3.

⁷ *Id.*

⁸ Meisenheimer Direct, Exhibit 3, p. 9.

⁹ Meisenheimer Direct, p. 10 and Schedules 4 and 5.

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the Farmington and Washington exchanges for residential services, for each of the exchanges previously granted competitive classification under the 30-day track, there was at least one unaffiliated full- or partial-facilities-based competitive local exchange carrier (CLEC) providing local voice service to at least one customer.¹⁰

15. For business services in the Marble Hill and Fulton exchange, and for residential services in the Farmington and Washington exchanges, the 2005 annual report data showed no facilities- or partial-facilities-based unaffiliated CLEC providing service.¹¹

16. AT&T also provided evidence of the carriers competing in each exchange.¹² That evidence came from its internal records identifying CLECs that have 911 listings, or ported telephone numbers within each exchange. This was the same type of evidence that the Commission relied upon in the original grant of competitive status.¹³

17. Staff's evidence from 2004 and 2005 annual reports is reliable.

18. AT&T's evidence from its internal records and from its wireless investigation is reliable.

19. Updated routing information from AT&T Missouri provided evidence that the Marble Hill exchange continues to have business services provided to at least one customer by Big River Telephone Company, LLC, a provider using its own facilities in whole or in part.¹⁴

20. Updated routing information from AT&T Missouri provided evidence that the Fulton exchange continues to have business services provided to at least one customer by XO, a provider using its own facilities in whole or in part.¹⁵

21. Updated routing information from AT&T Missouri provided evidence that the Washington exchange continues to have residential services provided to at least one customer by Big River Telephone Company, LLC, a provider using its own facilities in whole or in part.¹⁶

22. Updated routing information from AT&T Missouri provided evidence that the Farmington exchange continues to have

¹⁰ Exhibits 9HC and 10HC.

¹¹ *Id.*

¹² Unruh Rebuttal, Exhibit 5, Schedules 2-5.

¹³ Van Eschen Rebuttal, Exhibit 1, pp. 6-7.

¹⁴ Unruh Rebuttal, Exhibit 5, Revised Schedule 5.

¹⁵ Unruh Rebuttal, Exhibit 5, Revised Schedule 5.

¹⁶ Unruh Rebuttal, Exhibit 5, Revised Schedule 4.

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residential services provided to at least one customer by Charter, a provider using its own facilities in whole or in part.¹⁷

23. The 2005 annual report information also suggested that business services in the Clever exchange are not being provided to more than one customer on a full- or partial-facilities-basis.¹⁸

24. The Clever exchange has one facilities-based CLEC providing service to at least one customer and at least two "other resale" CLEC providing service in the exchange to more than one customer.¹⁹

25. Staff concluded that based on its review, competitive conditions continue to exist in all of AT&T Missouri exchanges designated as competitive.²⁰

26. Staff did a very limited review of the wireless carriers providing service in the exchanges because there were sufficient numbers of other carriers in each exchange to meet the 30- or 60-day track criteria without counting the wireless carriers.²¹

27. The Commission found that at least one wireless carrier was providing service to customers for each service in each of the 30-day exchanges granted competitive status in Case No. TO-2005-0093.

28. Mr. Van Eschen stated that "Staff is unaware of any wireless provider withdrawing service from any exchange."²²

29. There is at least one wireless carrier in each 30-day exchange as identified by AT&T by confirming the wireless service availability within the respective exchanges through each wireless carrier's individual website.²³

30. The 2005 annual report data shows that at least two providers are providing service via unbundled network element platform (UNE-P), interconnection agreements or other commercial agreements (referred to as "other resale")²⁴ to multiple business and residential customers in each of the examined exchanges for each service, either business or residential.²⁵

¹⁷ Unruh Rebuttal, Exhibit 5, Revised Schedule 4.

¹⁸ *Staff Report* (filed August 8, 2006); Van Eschen Rebuttal, p. 14; Exhibit 12HC.

¹⁹ Exhibit 12HC.

²⁰ *Staff Report* (filed August 8, 2006); Van Eschen Rebuttal, p. 14.

²¹ Van Eschen Rebuttal, p. 14.

²² Van Eschen Rebuttal, Exhibit 1HC, p. 13, Ins. 6-7.

²³ Ex. 5, Unruh Rebuttal, p. 5, schs. 4 and 5; Tr. Pp. 198-199.

²⁴ Van Eschen Rebuttal, Exhibit 1HC, p. 5.

²⁵ Van Eschen Rebuttal, Exhibit 1HC, Schedules 3 and 4.

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31. "Other resale" is not the same as "pure resale." "Pure resale" is where the CLEC offers the incumbent telephone company's service under the CLECs name and rates.²⁶

32. There are at least two wireless carriers in each 60-day exchange as identified by AT&T by confirming the wireless service availability within the respective exchanges through each wireless carrier's individual website.²⁷

33. There are at least two voice over Internet protocol (VoIP) providers in each 60-day business exchange except that there is only one VoIP provider in the Montgomery City exchange and none in the Portage Des Sioux exchange.²⁸

34. There are at least two voice over Internet protocol (VoIP) providers in each 60-day residential exchange except for the Portage Des Sioux exchange where there are none.²⁹

35. Business and residential basic local prices have increased since the grant of competitive classification in the exchanges indicated in Attachment A.³⁰

36. Exhibits 9HC – 12HC show the specific line counts from 2004 and 2005 for business and residential services in each exchange for each CLEC and AT&T Missouri.³¹ Attachment A shows whether the change has been positive, negative, or remained constant with regard to the number of facilities-based and "other resale" CLECs in each exchange.

37. The total number of lines provided to customers by CLECs in the 30-day business exchanges has decreased from 171,063 in 2004 to 153,020 in 2005.³²

38. The total number of lines provided to customers by AT&T Missouri in the 30-day business exchanges has increased from 2004 to 2005.³³

39. The total number of lines provided to customers by CLECs in the 30-day residential exchanges has increased from 103,954 in 2004 to 132,583 in 2005.³⁴

²⁶ Van Eschen Rebuttal, Exhibit 1HC, p. 5.

²⁷ Unruh Rebuttal, Exhibit 5, p. 5, schs. 4 and 5; Tr. Pp. 198-199.

²⁸ Unruh Rebuttal, Exhibit 5, Schedule 3.

²⁹ Unruh Rebuttal, Exhibit 5, Schedule 3.

³⁰ *Staff Report* (filed August 8, 2006), Appendices A-D.

³¹ The number of lines served is Highly Confidential information and is therefore not revealed in this Report and Order.

³² Exhibit 12HC.

³³ Exhibit 12HC.

³⁴ Exhibit 11HC.

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40. The total number of lines provided to customers by AT&T Missouri in the 30-day residential exchanges has decreased from 2004 to 2005.³⁵

41. The total number of lines provided to customers by CLECs in the 60-day business exchanges has decreased from 3,626 in 2004 to 3,500 in 2005.³⁶

42. The total number of lines provided to customers by AT&T Missouri in the 60-day business exchanges has increased from 2004 to 2005.³⁷

43. The total number of lines provided to customers by CLECs in the 60-day residential exchanges has decreased from 19,212 in 2004 to 17,714 in 2005.³⁸

44. The total number of lines provided to customers by AT&T Missouri in the 30-day residential exchanges has decreased from 2004 to 2005.³⁹

45. The number of facilities-based carriers providing business service to at least one customer within each 30-day exchange has increased with the exception of six exchanges. In only one of those exchanges, Lake Ozark-Osage Beach, has the number of "other resale" carriers also decreased.⁴⁰

46. The Lake Ozark-Osage Beach exchange has at least two facilities-based and nine "other resale" providers.⁴¹

47. The number of facilities-based CLECs providing residential service within each 30-day residential exchange has either increased or stayed constant and the number of "other resale" CLECs has also increased, with the exception of the Pond and Valley Park exchanges.⁴²

48. In the Pond exchange, there is at least one facilities-based CLEC providing residential service and at least ten (a decrease of one) "other resale" CLECs.⁴³

³⁵ Exhibit 11HC.

³⁶ Exhibit 10HC.

³⁷ Exhibit 10HC.

³⁸ Exhibit 9HC.

³⁹ Exhibit 9HC.

⁴⁰ Exhibit 12HC.

⁴¹ Exhibit 12HC.

⁴² Exhibit 11HC.

⁴³ Exhibit 11HC.

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49. In the Valley Park exchange, there is at least one facilities-based CLEC providing residential service and at least eleven (a decrease of one) "other resale" CLECs.⁴⁴

50. In the 30-day residential exchanges AT&T Missouri increased its lines in only two exchanges, Fredericktown and Bell City.⁴⁵

51. The Fredericktown exchange has at least one facilities-based carrier and ten "other resale" carriers providing residential service.⁴⁶

52. The Bell City exchange has at least one facilities-based carrier and five "other resale" carriers providing residential service.⁴⁷

53. In the 60-day business exchanges, CLECs lost lines and AT&T Missouri gained lines in only 11 out of 30 exchanges. Those exchanges are: Billings, Cedar Hill, Chaffee, Chillicothe, Desoto, Gray Summit, Hannibal, Hillsboro, Marionville, Moberly, and Richmond.⁴⁸

54. In the 60-day business exchanges the total number of providers or the number of facilities-based providers increased in all but 12 of the 30 exchanges.⁴⁹

55. Of those twelve exchanges, AT&T Missouri gained lines in only five. Those exchanges are: Billings, Cedar Hill, Hannibal, Linn, and Marionville.⁵⁰

56. The Billings exchange has at least three "other resale" CLECs (a decrease of one facilities-based CLEC from 2004) providing service to at least one customer according to the 2005 annual report data.⁵¹ AT&T Missouri data shows at least four CLECs, two wireless, and two VoIP providers in the exchange.⁵²

57. AT&T Missouri has not raised its basic local business rates in the Billings exchange.⁵³

58. The Cedar Hill exchange has at least one facilities-based CLEC and six "other resale" CLECs providing service to at least one customer according to the 2005 annual report data.⁵⁴ AT&T Missouri data

⁴⁴ Exhibit 11HC.

⁴⁴ Exhibit 11HC.

⁴⁴ Exhibit 11HC.

⁴⁵ Exhibit 11HC.

⁴⁶ Exhibit 11HC.

⁴⁷ Exhibit 11HC.

⁴⁸ Exhibit 10HC.

⁴⁹ Exhibit 10HC.

⁵⁰ Exhibit 10HC.

⁵¹ Exhibit 10HC.

⁵² Unruh Rebuttal, Exhibit 5, Schedule 3.

⁵³ Staff Report (filed August 8, 2006).

⁵⁴ Exhibit 10HC.

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shows at least four CLECs, two wireless, and two VoIP providers in the exchange.⁵⁵

59. AT&T Missouri has raised its basic local business rates by \$1.00 in the Cedar Hill exchange.⁵⁶

60. The Hannibal exchange has at least one facilities-based CLEC and nine “other resale” CLECs (a decrease of two “other resale” CLECs from 2004) providing service to at least one customer according to the 2005 annual report data.⁵⁷ AT&T Missouri data shows at least four CLECs, two wireless, and two VoIP providers in the exchange.⁵⁸

61. AT&T Missouri has raised its basic local business rates by \$1.00 in the Hannibal exchange.⁵⁹

62. The Linn exchange has at least one facilities-based CLEC and three “other resale” CLECs (a decrease of one “other resale” CLEC from 2004) providing service to at least one customer according to the 2005 annual report data.⁶⁰ AT&T Missouri data shows at least four CLECs, two wireless, and two VoIP providers in the exchange.⁶¹

63. AT&T Missouri has not raised its basic local business rates in the Linn exchange.⁶²

64. The Marionville exchange has at least one facilities-based CLEC and five “other resale” CLECs (a decrease of one “other resale” CLEC from 2004) providing service to at least one customer according to the 2005 annual report data.⁶³ AT&T Missouri data shows at least four CLECs, two wireless, and two VoIP providers in the exchange.⁶⁴

65. AT&T Missouri has not raised its basic local business rates in the Marionville exchange.⁶⁵

66. In the 60-day residential exchanges as a whole, both the CLECs and AT&T Missouri lost lines.⁶⁶

67. In the 60-day residential exchanges, CLECs lost lines and AT&T Missouri gained lines in only nine out of 51 exchanges. Those

⁵⁵ Unruh Rebuttal, Exhibit 5, Schedule 3.

⁵⁶ *Staff Report* (filed August 8, 2006).

⁵⁷ Exhibit 10HC.

⁵⁸ Unruh Rebuttal, Exhibit 5, Schedule 3.

⁵⁹ *Staff Report* (filed August 8, 2006).

⁶⁰ Exhibit 10HC.

⁶¹ Unruh Rebuttal, Exhibit 5, Schedule 3.

⁶² *Staff Report* (filed August 8, 2006).

⁶³ Exhibit 10HC.

⁶⁴ Unruh Rebuttal, Exhibit 5, Schedule 3.

⁶⁵ *Staff Report* (filed August 8, 2006).

⁶⁶ Exhibit 9HC.

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exchanges are: Antonia, Cedar Hill, Desoto, Excelsior Springs, Festus-Crystal City, Greenwood, Hillsboro, Union and Ware.⁶⁷

68. In the 60-day residential exchanges the total number of providers or the number of facilities-based providers increased in all but 19 of the 51 exchanges.⁶⁸

69. Of those 19 exchanges, CLECs gained lines in one exchange, Lake Ozark-Osage Beach. AT&T Missouri gained lines in only six exchanges: Antonia, Excelsior Springs, Festus-Crystal City, Hillsboro, Union, and Ware. In the remaining 26 exchanges, both CLECs and AT&T Missouri lost lines.⁶⁹

70. The Antonia exchange has at least three "other resale" CLECs (a decrease of three "other resale" CLECs from 2004) providing service to at least one customer according to the 2005 annual report data.⁷⁰ AT&T Missouri data shows at least four CLECs, two wireless, and two VoIP providers in the exchange.⁷¹

71. AT&T Missouri has not raised its basic local residential rates in the Antonia exchange.⁷²

72. The Excelsior Springs exchange has at least ten "other resale" CLECs (a decrease of one "other resale" CLEC from 2004) providing service to at least one customer according to the 2005 annual report data.⁷³ AT&T Missouri data shows at least four CLECs, two wireless, and two VoIP providers in the exchange.⁷⁴

73. AT&T Missouri has raised its basic local residential rates in the Excelsior Springs exchange.⁷⁵

74. The Festus-Crystal City exchange has at least nine "other resale" CLECs (a decrease of one "other resale" CLEC from 2004) providing service to at least one customer according to the 2005 annual report data.⁷⁶ AT&T Missouri data shows at least four CLECs, two wireless, and two VoIP providers in the exchange.⁷⁷

⁶⁷ Exhibit 9HC.

⁶⁸ Exhibit 9HC.

⁶⁹ Exhibit 9HC.

⁷⁰ Exhibit 9HC.

⁷¹ Unruh Rebuttal, Exhibit 5, Schedule 3.

⁷² *Staff Report* (filed August 8, 2006).

⁷³ Exhibit 9HC.

⁷⁴ Unruh Rebuttal, Exhibit 5, Schedule 3.

⁷⁵ *Staff Report* (filed August 8, 2006).

⁷⁶ Exhibit 9HC.

⁷⁷ Unruh Rebuttal, Exhibit 5, Schedule 3.

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75. AT&T Missouri has raised its basic local residential rates in the Festus-Crystal City exchange.⁷⁸

76. The Hillsboro exchange has at least five "other resale" CLECs (a decrease of one "other resale" CLEC from 2004) providing service to at least one customer according to the 2005 annual report data.⁷⁹ AT&T Missouri data shows at least four CLECs, two wireless, and two VoIP providers in the exchange.⁸⁰

77. AT&T Missouri has not raised its basic local residential rates in the Hillsboro exchange.⁸¹

78. The Union exchange has at least ten "other resale" CLECs (a decrease of one "other resale" CLEC from 2004) providing service to at least one customer according to the 2005 annual report data.⁸² AT&T Missouri data shows at least four CLECs, two wireless, and two VoIP providers in the exchange.⁸³

79. AT&T Missouri has raised its basic local residential rates in the Union exchange.⁸⁴

80. The Ware exchange has at least five "other resale" CLECs (a decrease of one "other resale" CLECs from 2004) providing service to at least one customer according to the 2005 annual report data.⁸⁵ AT&T Missouri data shows at least four CLECs, two wireless, and two VoIP providers in the exchange.⁸⁶

81. AT&T Missouri has not raised its basic local residential rates in the Ware exchange.⁸⁷

82. The number of competitors in the telecommunications market is expected to fluctuate over time.⁸⁸

83. The number of lines held by any given competitor is expected to fluctuate over time.⁸⁹

⁷⁸ *Staff Report* (filed August 8, 2006).

⁷⁹ Exhibit 9HC.

⁸⁰ Unruh Rebuttal, Exhibit 5, Schedule 3.

⁸¹ *Staff Report* (filed August 8, 2006).

⁸² Exhibit 9HC.

⁸³ Unruh Rebuttal, Exhibit 5, Schedule 3.

⁸⁴ *Staff Report* (filed August 8, 2006).

⁸⁵ Exhibit 9HC.

⁸⁶ Unruh Rebuttal, Exhibit 5, Schedule 3.

⁸⁷ *Staff Report* (filed August 8, 2006).

⁸⁸ Transcript, p. 42.

⁸⁹ Transcript, p. 42.

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84. Revised Exhibit 14⁹⁰ shows the current (as of the date filed) vertical services rates; Exhibit 17, and the Supplement to Exhibit 17, show the non-basic services rate changes over time.

85. Southwestern Bell Telephone Company and AT&T Communications recently merged to become one company, Southwestern Bell Telephone Company, L.P., d/b/a AT&T Missouri.⁹¹

86. MCI, a competitor to AT&T Missouri, was acquired by Verizon, another competitor of AT&T Missouri.⁹²

87. In Case Nos. TO-2006-0093 and TO-2006-0102, AT&T Communications of the Southwest, Inc., and its affiliates were not part of the evidence of competition considered.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

AT&T Missouri is an incumbent basic local telecommunications service provider under the jurisdiction of the Commission pursuant to Chapter 392, RSMo.

The Commission must periodically review the exchanges in which it grants competitive classification to determine if conditions as provided under the statute have changed. Subsection 392.245.5, RSMo, states in relevant part:

The commission shall, at least every two years, or where an incumbent local exchange telecommunications company increases rates for basic local telecommunications services in an exchange classified as competitive, review those exchanges where an incumbent local exchange carrier's services have been classified as competitive, **to determine if the conditions of this subsection for competitive classification continue to exist in the exchange** and if the commission determines, after hearing, that such conditions no longer exist for the incumbent local exchange telecommunications company in such exchange, it shall reimpose upon the incumbent local

⁹⁰ AT&T offered corrections to Exhibit 14, which were received without objection. On the third, fourth, and fifth lines of Staff's spreadsheet, under the dates 7/19/2004, 6/14/2004, and 5/21/2004, the rate for Speed Calling 8 was therefore revised by Staff to \$3.75.

⁹¹ Meisenheimer Direct, Exhibit 3, p. 10.

⁹² Meisenheimer Direct, p.10.

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exchange telecommunications company, in such exchange, the provisions of paragraph (c) of subdivision (2) of subsection 4 of section 392.200 and the maximum allowable prices established by the provisions of subsections 4 and 11 of this section . . .⁹³

In Commission Case No. TO-2006-0093, the Commission granted AT&T Missouri competitive classification under the "30-day track" of Subsection 392.245.5, RSMo, for business services in 45 exchanges and for residential services in 26 exchanges. In Commission Case No. TO-2006-0102, the Commission granted AT&T Missouri competitive classification under the "60-day track" of Subsection 392.245.5, RSMo, for business services in 30 exchanges and for residential services in 51 exchanges.

The "30-day track" requires that the Commission designate the business and/or residential services in an exchange as competitive within 30-days of a request if the Commission finds that "two nonaffiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to [business and/or] residential customers within the exchange."⁹⁴ One wireless provider shall be counted,⁹⁵ as shall [a]ny entity providing local voice service in whole or in part over . . . facilities in which it or one of its affiliates have an ownership interest."⁹⁶

The "60-day track" requires that the Commission designate the business and/or residential services in an exchange as competitive within 60 days of the request if the Commission finds the two entities providing the appropriate type of services to customers within the exchange, unless the Commission "finds that such competitive classification is contrary to the public interest."⁹⁷ For the 60-day track, the competitor may be "using its own . . . facilities . . . or the . . . facilities of a third party, including those of the incumbent local exchange company as well as providers that rely on an unaffiliated third-party Internet service."⁹⁸

⁹³ Emphasis added.

⁹⁴ 392.245.5.

⁹⁵ 392.245.5(1).

⁹⁶ 392.245.5(2).

⁹⁷ 392.245.5(6).

⁹⁸ 392.245.5(6).

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In determining what is in, or contrary to, the public interest, the Commission must consider all relevant factors, just as it considers all relevant factors in setting rates.⁹⁹

Subsection 392.245.5(6) specifically authorizes price increases for competitive services. The statute states in relevant part:

If the services of an incumbent local exchange telecommunications company are classified as competitive under this subsection, the local exchange telecommunications company may thereafter adjust its rates for such competitive services upward or downward as it determines appropriate in its competitive environment

The party asserting the positive of a proposition has the burden of proving that proposition.¹⁰⁰ Subsection 392.245.5 directs the Commission to review the exchanges "to determine if the conditions of this subsection for competitive classification continue to exist in the exchange . . ." AT&T Missouri and Staff have asserted that those conditions do continue to exist. Thus, those parties bear the burden on that point. AT&T Missouri and Staff have met that burden.

Public Counsel asserts the proposition that continuing competitive classification is "contrary to the public interest" and thus, Public Counsel bears the burden of proving this assertion. Public Counsel has not met its burden.

Decision

The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision. After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decision.

The conditions of Subsection 392.245.5, RSMo, have not changed since the grant of competitive classification in each of Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri's exchanges in which competitive classification was previously granted in Commission Case

⁹⁹ State ex rel. Utility Consumers Council, Inc. v. Public Service Commission, 585 S.W.2d 41, 49 (Mo. 1979); State ex rel. Laclede Gas Co. v. Public Service Commission, 535 S.W.2d 561 (Mo. App. 1976).

¹⁰⁰ *Dycus v. Cross*, 869 S.W.2d 745, 749 (Mo. banc 1994).

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Nos. TO-2006-0093 and TO-2006-0102. The Commission examined the evidence presented by the parties and for convenience has set out portions of that evidence in chart format attached hereto as Attachment A. As that chart shows, before AT&T's evidence is considered, there are 26 exchanges which were designated as competitive under the 30-day track which now have multiple unaffiliated facilities-based providers providing business service to customers in those exchanges. There are also eight exchanges which were designated as competitive under the 30-day track which now have multiple unaffiliated facilities-based providers providing residential service to customers in those exchanges.

The chart also shows that of the 60-day track business exchanges, seven would currently meet the 30-day criteria in that there are multiple facilities-based providers providing business services to customers in the exchanges. The chart further shows that of the 60-day track business exchanges, three would currently meet the 30-day criteria in that there are multiple facilities-based providers providing residential services to customers in the exchanges.

In addition, AT&T Missouri presented evidence that at least one facilities-based carrier and at least one wireless carrier are still providing business and residential service in each of the 30-day exchanges as they were in the original cases which granted competitive classification. And, AT&T provided evidence that at least four CLECs and two wireless carriers are providing service in each of the 60-day exchanges. In addition, AT&T provided evidence of at least two VoIP providers in all but two 60-day exchanges (Portage Des Sioux and Montgomery City) and one VoIP provider in one of those exchanges (Montgomery City).

Considering AT&T Missouri's evidence of facilities-based CLECs in each exchange, a total of 27 of the 51 60-day residential exchanges meet the 30-day criteria, and a total of 27 of 30 60-day business exchanges meet the 30-day criteria.

It is clear from this evidence that in the exchanges where business and residential services would currently meet the 30-day criteria, the competitive classification should remain. Conditions which precipitated the grant of competitive classification have not changed. And even if such conditions had changed it cannot be in the public interest to place those exchanges back under price cap regulation, only to have AT&T Missouri again request competitive classification which the Commission would be required to grant under the 30-day track.

With regard to the remaining 30-day business exchanges, all but two, Marble Hill and Fulton, have a facilities-based carrier and multiple

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"other resale" carriers. Looking at the additional evidence presented by AT&T Missouri, it is clear that the Marble Hill and the Fulton exchanges still qualify under the 30-day criteria. AT&T Missouri gathered number porting information which showed that there was in fact a facilities-based provider serving business customers in that exchange. The same was true for the Washington and Farmington residential exchanges. Those exchanges were the only gaps in the evidence provided from the 2005 annual reports, and AT&T Missouri satisfactorily established that there was a facilities-based carrier present in those exchanges.

The only other exception was business services in the Clever exchange. In that exchange there did not appear to be multiple customers being served. However, there was sufficient evidence from the 2005 annual reports and AT&T Missouri to establish that multiple customers were being served by multiple carriers which would meet the 60-day criteria.

In each of the 60-day exchanges that do not meet the 30-day criteria, there were no less than three, and as many as 16, CLECs meeting the definition of an entity providing local service under Subsection 392.245.5. Thus, the Commission can easily determine that strictly based on the numbers of carriers in existence, competitive conditions have not changed. The Commission must next evaluate the public interest in the 60-day exchanges.

Public Counsel argues that the rate increases for basic and non-basic services soon after competitive classification was granted are evidence that continuing competitive classification is "contrary to the public interest." In addition, Public Counsel suggests that AT&T (then Southwestern Bell) misled the Commission by stating that no rate increases were planned at the time competitive status was granted. Public Counsel also argues that the acquisition of AT&T by Southwestern Bell and the acquisition of MCI by Verizon decreased competition.

Public Counsel believes that Staff's investigation shows that there is little to no local facilities-based competition and the number of competitors has dwindled. In total, the number of lines served by CLECs has decreased. The number of lines served by CLECs, however, has increased in some exchanges, and in many exchanges, the number of lines held by AT&T has also decreased.

When examined on an exchange-by-exchange basis, the Commission finds that the competitive designation is not contrary to the public interest. It is true that the rise in AT&T Missouri's basic local rates so soon on the heels of competitive status was disappointing. This fact alone, however, does not prove that a competitive classification should not

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continue. Obviously, the legislature intended AT&T Missouri to be allowed to raise rates or it would not have authorized it in the statute.

The Commission has examined each exchange individually. Companies, however, do not do business exclusively in one exchange and, therefore, examination of the market as a whole is also relevant to determining if conditions in an exchange have changed or if the continuing designation is "contrary to the public interest." The increase in rates and the loss in some exchanges of CLEC lines or a decrease in the number of CLECs are not so egregious that the Commission must find a continuing competitive designation is not in the public interest.

In each exchange, the make-up of carriers and the numbers of lines held is fluctuating. Not all of this fluctuation, however, is to the detriment of the CLECs. This fluctuation is also not unexpected when competition exists. In some areas, AT&T Missouri lost lines and the CLECs gained lines. In some exchanges, the number of resale providers dropped but the exchange gained facilities-based providers. There was evidence of wireless providers in all exchanges and at least two VoIP providers in all of the 60-day exchanges.¹⁰¹

This total market picture shows that there is some competition in the exchanges. The legislature has made it clear that competition is a desired outcome of deregulation. Therefore, it is not contrary to the public interest to allow the market to continue to evolve.

The Commission determines that all of the previous 30-day exchanges continue to have the requisite numbers of facilities-based, "other resale," and wireless carriers to meet the 30-day criteria. In addition, the Commission determines that 27¹⁰² of the 30 60-day business exchanges and 27¹⁰³ of the 51 60-day residential exchanges meet the 30-day requirements. Furthermore, the remaining three 60-day business and 24 60-day residential exchanges meet the 60-day criteria with regard to the requisite numbers of facilities-based and/or "other resale" providers. It is not contrary to the public interest to continue with the competitive

¹⁰¹ The exceptions to the VoIP providers are the Portage Des Sioux exchange, which had none, and the Montgomery City exchange, which had only one.

¹⁰² Those exchanges are: Ash Grove, Billings, Boonville, Carthage, Cedar Hill, Chaffee, DeSoto, Dexter, Excelsior Springs, Farley, Gray Summit, Hannibal, Hillsboro, Kennett, Kirksville, Linn, Marionville, Marshall, Mexico, Moberly, Montgomery City, Neosho, Portage Des Sioux, Richmond, St. Clair, Union, and Ware.

¹⁰³ Those exchanges are: Antonia, Ash Grove, Billings, Bonne Terre, Boonville, Cape Girardeau, DeSoto, Dexter, Excelsior Springs, Festus-Crystal City, Flat River, Gray Summit, Hannibal, Herculaneum-Pevely, High Ridge, Hillsboro, Imperial, Jackson, Joplin, Kennett, Maxville, Poplar Bluff, Richmond, San Antonio, Sikeston, St. Clair, and Walnut Grove.

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designation in any of the exchanges. The previously designated exchanges of AT&T Missouri shall remain so designated.

IT IS ORDERED THAT:

1. Exhibits 9HC, 9NP, 10HC, 10NP, 11HC, 11NP, 12HC, and 12NP are admitted into evidence.
2. Revised Exhibit 14 is admitted into evidence and substituted for the original Exhibit 14.
3. Exhibit 17 as submitted by Staff is admitted into evidence.
4. The Supplement to Exhibit 17 filed by the Office of the Public Counsel is admitted into evidence.
5. The *Staff Report* filed in this case on August 8, 2006, is admitted into evidence.
6. Each of Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri's exchanges in which competitive classification was granted in Commission Case Nos. TO-2006-0093 and TO-2006-0102 shall continue to be designated as competitive.
7. The Staff of the Missouri Public Service Commission shall continue to review the competitive classification of each exchange as least as often as required by the statute and may do so on an annual basis.
8. Any objections not ruled upon are overruled and any motions not ruled upon are denied.
9. This Report and Order shall become effective on July 22, 2007.

Davis, Chm., Murray and Appling, CC., concur
Gaw and Clayton, CC., dissent and certify
compliance with the provisions of Section 536.080, RSMo.

NOTE: The attachment in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

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Jason Becker, Becker Development Company, Complainant, v. Aqua Missouri, Inc., Respondent.

Case No. SC-2007-0044 et al.

Decided July 12, 2007

Sewer §2. The Commission ordered that Aqua Missouri, Inc. connect ten additional houses to the sewer system at the Lake Carmel subdivision, in view of the fact that, Aqua Missouri holds a certificate of convenience and necessity to provide sewer service in the Lake Carmel area.

Sewer §3. The Commission ordered that Aqua Missouri, Inc. connect ten additional houses to the sewer system at the Lake Carmel subdivision, in view of the fact that, Aqua Missouri holds a certificate of convenience and necessity to provide sewer service in the Lake Carmel area.

APPEARANCES

Keith A. Wenzel, HENDREN ANDRAE, LLC, 221 Bolivar Street, Jefferson City, Missouri 65102, for Jason Becker and Becker Development, Inc.

Marc H. Ellinger, BLITZ, BARDGETT & DEUTSCH, L.C., 308 E. High Street, Suite 301 Jefferson City, Missouri 65101, for Aqua Missouri, Inc.

Christina Baker, Assistant Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel.

Kevin A. Thompson, General Counsel, P.O. Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Morris L. Woodruff, Deputy Chief Regulatory Law Judge

REPORT AND ORDER

Syllabus: After considering Jason Becker and Becker Development Company's complaint against Aqua Missouri, Inc., the Commission finds that Aqua Missouri must allow ten additional houses to be connected to its existing sewer system at Lake Carmel. If Becker wishes to build additional houses that would require an expansion of the existing sewer system, it must enter into a developer agreement with Aqua Missouri as required by the company's tariff.

Findings Of Fact

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the

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following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Procedural History

On August 7, 2006, Jason Becker and Becker Development Company (Becker) filed two complaints against Aqua Missouri, Inc. The complaints, assigned Case Numbers SC-2007-0044 and SC-2007-0045, allege that Aqua Missouri has refused to provide water and sewer utility service to multiple lots that Becker owns in the Lake Carmel subdivision served by Aqua Missouri. By a notice issued on August 8, pursuant to Commission Rule 4 CSR 240-2.070(7), the Commission served a copy of both complaints on Aqua Missouri. Aqua Missouri timely responded to both complaints by filing their answers on September 7. The two complaints were subsequently consolidated into Case Number SC-2007-0044.

The Commission established a procedural schedule requiring the parties to prefile written direct, rebuttal, and surrebuttal testimony. An evidentiary hearing was held on April 23, 2007. Post-Hearing briefs were submitted on May 31.

The Development at Lake Carmel

Aqua Missouri currently holds a certificate of convenience and necessity from this Commission and provides regulated water and sewer service to approximately 46 homes at Lake Carmel, a housing development located in rural Cole County, Missouri. An additional three homes receive only water service.¹ The sewer treatment facility serving Lake Carmel was originally built by the developer of the subdivision and in 1973 was contributed to a regulated sewer utility known as Lake Carmel Development Co., Inc.² In 1998, that company sold the sewer system to Capital Utilities, Inc. Capital Utilities subsequently became AquaSource/CU, Inc., which was in turn purchased by Aqua America, Inc., effective August 1, 2003, to do business as Aqua Missouri, Inc.³

¹ Transcript, Page 139, Lines 22-24.

² Memorandum, Commission Case No. WM-98-130. The memorandum is attached to the testimony of Hale-Rush Rebuttal, Ex. 4.

³ Hale-Rush Rebuttal, Ex. 4, Page 2, Lines 9-11.

Becker Development Company, LLC, of which the other complainant, Jason Becker, is a principal, purchased the undeveloped portion of the Lake Carmel development in 1998.⁴ Becker owns a total of 65 lots in the development.⁵ Beginning in 2003, Becker demanded that Aqua Missouri extend water and sewer service to the previously unplatted portion of the Lake Carmel subdivision. That extension would serve an additional 47 homes.⁶ Aqua Missouri agreed to the extension of its water and sewer system to serve the new homes, but would do so only if Becker signed a Developer Agreement, by which Becker would be required to pay for the expansion of the system, including an expansion of the capacity of the sewer treatment facility.⁷ Becker contends that Aqua Missouri, not the developer, should be required to pay for expansion of the existing sewer treatment facility and has refused to sign a developer agreement that would require the developer to pay for such expansion.

In addition to the proposal to plat a new development area, Becker currently owns 13 lots at Lake Carmel that are ready to build, except for the lack of available sewer service.⁸ Aqua Missouri has refused to provide service to Becker's building lots, contending that its sewer treatment plant is already above its allowed capacity. Until this dispute is resolved, Becker will be unable to build houses on the lots that he owns at Lake Carmel.

The Sewage Treatment Facility at Lake Carmel

The existing sewage treatment facility at Lake Carmel includes a gravity-fed collection system emptying into a three-cell lagoon. In other words, the wastewater flows through collecting mains by force of gravity and is collected in a series of three ponds. While the wastewater is retained in the ponds it is treated through natural biological action.⁹ Eventually, the treated water flows through each of the three treatment cells and is discharged into a creek.¹⁰

The sewage treatment plant at Lake Carmel operates with a current permit from the Missouri Department of Natural Resources (DNR). The operating permit indicates that the sewage lagoons are designed to handle a flow of 12,600 gallons of wastewater per day. Using a DNR standard of

⁴ Becker Direct, Ex. 6, paragraph 2.

⁵ Transcript, Page 9, Lines 22-24.

⁶ Id. at paragraph 10.

⁷ Hale-Rush Rebuttal, Ex. 4, Page 4, Lines 3-11.

⁸ Transcript, Page 15, Lines 20-22.

⁹ Transcript, Page 52, Lines 18-24.

¹⁰ Transcript, Page 53, Lines 8-19.

100 gallons per person, per day, the operating permit is based on an assumed population of 126 persons served by the plant. Assuming 3.7 persons per household, the operating permit is based on the assumption that 34 houses can be served by the existing lagoons.¹¹

The Service Provided by the Lake Carmel Sewer System

Aqua-Missouri currently uses the sewage lagoons to provide service to 46 houses in the Lake Carmel subdivision. Again, assuming 3.7 persons per household, producing 100 gallons of wastewater per day, current usage would produce an expected total flow of 17,020 gallons per day into the lagoon system.¹² By that measure, the sewage lagoons are already substantially over their designed capacity.

However, measurement of the amount of water Aqua Missouri sold to the residences in the Lake Carmel subdivision indicates an average water usage of only 170 gallons per house, per day.¹³ That means that either the average population in those homes is less than the assumed 3.7 residents, or those residents use less than the assumed 100 gallons of water per day. Since the amount of wastewater flowing out of a house, should not be more than the amount of fresh water flowing in, the amount of wastewater flowing into the sewage lagoons should be approximately 7,820 gallons per day,¹⁴ which is below designed capacity.

Aqua Missouri has, on occasion, actually measured the amount of water flowing into the sewage lagoons. For March 22 through 29, 2006, a wet period, the average daily flow was measured at 29,904 gallons per day, varying from a maximum of 49,999 gallons to a minimum of 10,077 gallons. For June 8 through 19, 2006, a dry period, the average daily flow was measured at 17,836 gallons per day, varying from a maximum of 39,113 gallons to a minimum of 9,941 gallons.¹⁵

Those numbers indicate that Aqua Missouri's sewer system at Lake Carmel has an inflow and infiltration problem. In other words, outside water is entering the wastewater system and draining into the sewage lagoons. Inflow and infiltration can occur when rainfall enters the system through manholes, or it can result from ground water leaking into the sewer mains. For this system a possible source of such ground water is leakage from the lake that gives the Lake Carmel subdivision its name. Aqua Missouri has

¹¹ Gaebe Direct, Ex. 2, Attachment ROG-2.

¹² 46 houses x 3.7 persons per house x 100 gallons per person = 17,020 gallons per day.

¹³ Wells Surrebuttal, Ex. 8, Page 2.

¹⁴ 46 houses x 170 gallons per day = 7,820 gallons per day.

¹⁵ Gaebe Direct, Ex. 2, Attachment ROG-2.

taken steps to reduce the amount of inflow and infiltration into its system by repairing manholes, but at the time of the hearing, was still looking at possible solutions to further address the problem.¹⁶

The effect of the inflow and infiltration problem on the Lake Carmel sewage lagoons is mixed. The increased amount of water flowing into the lagoons causes the water to flow through the lagoons more quickly, reducing the amount of time water is retained in the lagoons. Since the water flows through the lagoons more quickly, less time is available to allow natural biological action to clean the water.¹⁷ On the other hand, the clean water flowing into the system tends to dilute the wastewater. As a result, the water flowing out of the lagoons is cleaner than it would otherwise be.¹⁸ So, despite the increased flows, the water flowing out of the lagoons, which is monitored by DNR, has met pollution control standards and has not caused DNR to issue any notices of violation to Aqua Missouri.¹⁹

Inflow and infiltration is not the only problem affecting the Lake Carmel sewage lagoons. The lagoons are designed to retain some solid waste as sludge, which accumulates at the bottom of the ponds. Over the 35 years that the lagoons have been operating, several feet of sludge have accumulated, reducing the volume of wastewater that can be retained in the lagoons.²⁰ Because of the buildup of sludge, the lagoons are now able to treat only about three-quarters of its designed wastewater flow capacity.²¹ Eventually, even if no more houses are added to the system, the lagoons will fill with sludge and will need to be upgraded or replaced.²²

Two possible solutions were offered to increase the flow capacity of the lagoons to restore the sewage treatment facility to its designed capacity. One solution would be to simply use earth moving equipment to raise the berms surrounding the lagoons by about 18 inches, thereby increasing the depth of the lagoons and increasing their capacity.²³ Thomas Wells, the consulting engineer engaged by Becker, who offered this solution, testified that he had not calculated the cost required to raise the berms.²⁴ The other solution would be to dredge the lagoons to remove the accumulated sludge

¹⁶ Transcript, Pages 146-147, Lines 16-25, 1-4.

¹⁷ Transcript, Page 116, Lines 8-14.

¹⁸ Transcript, Page 36, Lines 11-21.

¹⁹ Transcript, Page 56, Lines 13-16.

²⁰ Transcript, Pages 131-132, Lines 19-25, 1-3.

²¹ Transcript, Pages 32-33, Lines 23-25, 1-5.

²² Transcript, Pages 135-136, Lines 22-25, 1.

²³ Wells Surrebuttal, Lake Carmel Lagoon Volume Confirmation, Transcript, Pages 27-28, Lines 21-25, 1-2.

²⁴ Transcript, Page 28, Lines 12-17.

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and restore their original depth and capacity. Wells also did not calculate the cost to dredge the lagoons.²⁵ However, Tena Hale-Rush, Regional Manager for Aqua Missouri, testified that the cost of dredging a similar lagoon would exceed \$100,000.²⁶

Even if the inflow and infiltration problem is corrected and the lagoons are restored to their designed capacity, the sewage treatment facility serving Lake Carmel is still at or near its capacity. Thomas Wells, Becker's expert, testified that raising the berms to restore full capacity for the lagoons would allow perhaps four additional houses to be connected to the system.²⁷ To connect any additional houses would require a "significant upgrade of capacity."²⁸ Similarly, Robert Gaebe, the civil engineer who testified for Aqua Missouri, indicated that even if the entire inflow and infiltration problem were corrected, at most an additional 10 to 12 houses could be connected to the current system without a major upgrade to the system.²⁹

Staff's witness, James Merciel, who is also a civil engineer, testified that there are three primary options available for making a major upgrade to the current sewer system. Those options are:

- 1) expand or modify the existing treatment facility, such as by adding a fourth lagoon cell, or adding mechanical equipment such as surface aerators, mechanical aeration units or clarifier units;
- 2) construct a 'parallel' treatment facility that would operate in addition to, but separate from, the existing facility; or
- 3) abandon the existing treatment facility and construct a replacement facility with sufficient capacity to serve existing customers as well as a reasonable level of future customers.³⁰

Neither Becker nor Aqua Missouri disagree with Merciel's description of the available options. However, they do not agree upon any particular solution.

While Aqua Missouri has refused to allow Becker to connect any further houses to the sewer system because of the alleged lack of capacity,

²⁵ Transcript, Page 40, Lines 7-11.

²⁶ Transcript, Page 148, Lines 10-20.

²⁷ Transcript, Page 27, Lines 11-20.

²⁸ Transcript, Page 30, Lines 20-23.

²⁹ Transcript, Page 129, Lines 7-15.

³⁰ Merciel Rebuttal, Ex. 1, Page 5, Lines 6-12.

it has not prevented other individual homeowners, who are not associated with a developer, from connecting their homes to the sewer system. In the past year, Aqua Missouri has granted two such individual homeowners access to connect their houses to the sewer system.³¹ In fact, Aqua Missouri has never denied an individual homeowner access to the Lake Carmel sewer system.³²

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law:

1. Aqua Missouri is a "Public Utility" and a "Sewer Corporation", as those terms are defined at Section 386.020 (42) and (48), RSMo Supp. 2006. As such it is subject to regulation by this Commission.

2. Section 393.140(1), RSMo 2000 gives the Commission general power to investigate the quality of sewer service furnished by a sewer corporation and to order such reasonable improvements "as will best promote the public interest, preserve the public health and protect those using such ... sewer system".

3. Section 393.130.1, RSMo Supp. 2006 requires every sewer corporation to "furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable."

4. Section 393.130.3, RSMo Supp. 2006 states:

No ... sewer corporation shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

5. Section 386.390.1, RSMo 2000 gives the Commission authority to hear a complaint alleging "any act or thing done or omitted to be done" by any public utility "in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission."

6. As the party bringing a complaint, Becker has the burden of proving its allegations.³³

³¹ Transcript, Page 143, Lines 12-21.

³² Transcript, Page 144, Lines 1-7.

³³ State ex rel GS Technologies Operating Co., Inc. v. Pub. Serv. Comm'n, 116 S.W.3d 680 (Mo. App. W.D. 2003).

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7. Aqua Missouri holds a certificate of convenience and necessity to provide sewer service in the Lake Carmel area. Missouri's courts have established as a general principle that "[t]he certificate of convenience and necessity issued to the utility is a mandate to serve the area covered and it is the utility's duty, within reasonable limitations, to serve all persons in an area it has undertaken to serve."³⁴

8. A utility tariff that has been approved by the Commission becomes Missouri law, and has "the same force and effect as a statute directly prescribed from the legislature."³⁵ In interpreting a tariff, the Commission is required to "ascertain the intent of [the utility and the Commission] from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning."³⁶

9. Rule 12(b) of Aqua Missouri's applicable, approved, tariff states:

This Rule shall govern the construction of new treatment facilities and/or extension of new collecting sewers requested by a Developer in areas within the Company's certificated service area where the company currently does not serve.³⁷

This is the section of Aqua Missouri's tariff that sets out the procedures to be followed by developers in requesting sewer service for a newly developed area.

10. Rule 12(b)(1) of the same tariff states:

A Developer shall enter into a contract (See Exhibit B) with the Company. The contract shall provide that the Developer may construct said collecting sewers to meet the requirements of all governmental agencies and the Company's Rules and Regulations, including the Company's Technical Specifications. The Developer shall contribute said sewer collection/treatment system to the Company with a detailed accounting of the actual cost of construction (excluding income taxes).

³⁴ State ex rel Missouri Power and Light Co. v. Pub. Serv. Comm'n, 669 S.W. 2d 941, 946 (Mo. App. W.D. 1984).

³⁵ State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n, 156 S.W. 3d 513, 521, (Mo. App. W.D. 2005).

³⁶ Id.

³⁷ P.S.C. Mo. No. 2, Original Sheet No. SRR 43. A copy of this section of the tariff was admitted into evidence as Exhibit 10.

The “Exhibit B” referenced in this section of the tariff is a sample of an extension agreement that is also set out in Aqua Missouri’s tariff.³⁸ Becker has refused to sign such an extension agreement and Aqua Missouri has refused to provide service to Becker’s houses until such agreement is signed.

11. Rule 12(b)(1) and the accompanying extension agreement require a developer, such as Becker, to either construct, or at least pay for, any new collecting sewer mains and treatment facilities needed to serve the newly developed area. After the collecting mains and treatment facilities are built, the developer is required to “contribute” the mains and treatment facilities to the utility, which will then operate the sewer system.

12. Aqua Missouri’s tariff does not require Becker, or any other developer, to pay extra to maintain existing sewer treatment facilities. Nor does it require a developer to pay extra to hook up additional homes that can be served by existing sewer treatment facilities. Those costs are to be recovered through the rates the utility charges all its customers.

DECISION

The Commission has reached the following decisions regarding the issues described by the parties in the List of Issues filed before the start of the hearing.

I. Service to Becker

a) Has Aqua Missouri violated its obligation as a public utility by refusing to serve Becker despite repeated requests?

As a public utility, Aqua Missouri has a general mandate, within reasonable limits, to provide service to members of the public within its designated service area. Aqua Missouri’s tariff imposes additional requirements on developers whose development plans will require the construction of new treatment facilities or the extension of new collecting sewers. Essentially, a developer is required to pay for the extension of sewers needed to serve the new development as well as for any new treatment facilities needed to serve the new development.

The additional requirements that Aqua Missouri’s tariff imposes are reasonable. The developer, and ultimately the buyer of the developed property, should be responsible for the cost of constructing the sewer facilities needed to serve that property. If the developer and the developer’s customers are not held responsible for paying those costs, the costs of

³⁸ P.S.C. Mo. No. 2, Original Sheet Nos. SE 6-10. A copy of this section of the tariff was admitted into evidence as Exhibit 9.

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serving the newly developed property would be unfairly imposed, through higher rates, upon the homeowners currently served by the existing sewer system, while the developer collects the extra profits.

Staff argues that Aqua Missouri's tariff requires a developer to pay only for *new* treatment facilities, while requiring the utility, and ultimately its existing customers, to pay unlimited amounts for expansion of existing treatment facilities needed to serve new developments. Staff's reading of the tariff is unreasonably narrow, and would unfairly impose development costs on existing customer of the utility. In the context of this case, Staff's interpretation would require Aqua Missouri and its existing customers to fully bear the cost of doubling the capacity of the existing sewer treatment facilities to serve Becker's new development, so long as the expanded facilities cannot be called a *new* facility. However, the distinction that Staff would draw between a *new* facility and the expansion of an existing facility would be difficult to discern and is essentially meaningless. For example, if Aqua Missouri digs a fourth lagoon cell, is that a *new* facility or an expansion of the existing facility? That distinction should not be the basis for assigning hundreds of thousands of dollars in costs. Rather, the important principle is that a cost causer should be required to pay for the costs caused. Whether providing sewer service to a new development requires a new treatment facility, or a new expansion of an existing facility, it is the responsibility of the developer to pay for the costs of providing that service. Therefore, the Commission finds that in Aqua Missouri's tariff, *new* treatment facilities means any additional treatment facilities required to serve the new development.

That explanation of Aqua Missouri's tariff, does not, however, mean that Aqua Missouri is justified in refusing to provide service to any houses built by Becker. The evidence indicates that Aqua Missouri currently has some available capacity on the Lake Carmel sewer system. The utility has continued to allow individual home builders to hook up to its sewer system; two new homes have been promised connection in the past year. While Aqua Missouri's tariff requires Becker to pay for new treatment capacity, there is nothing in its tariff that would allow Aqua Missouri to discriminate against Becker in the allocation of its existing sewage treatment capacity. To the extent that it has available treatment capacity, Aqua Missouri must make that capacity available to Becker on the same terms that it makes that capacity available to any other potential customer.

The question then becomes: how much sewage treatment capacity does Aqua Missouri have available? The answer to that question is not clear from the record, and unfortunately, it seems likely that no one,

including Aqua Missouri, really knows. That is unfortunate because as a public utility, Aqua Missouri has an obligation to know the capacity of its system and to know how many customers it can serve without violating pollution control regulations.

It is apparent that, as they are currently operating, the sewage treatment lagoons at Lake Carmel are at or near their capacity. It is also apparent that the lagoons are currently operating at less than their designed and permitted capacity because of an inflow and infiltration problem, as well as the natural buildup of sludge during the life of the lagoons. Aqua Missouri must maintain and operate its sewer system in a way that will provide safe and adequate service to its customers. It cannot pass those costs on to a developer or other customer, except through Commission approved rates. Therefore, Aqua Missouri must pay for whatever maintenance or repairs are reasonably necessary to keep its sewer system operating at its designed capacity. In this case, that means paying the cost of fixing the inflow and infiltration problem and taking appropriate action to restore the wastewater storage capacity of the lagoons to their designed capacity, either by raising the level of the surrounding berms, or dredging and removing the accumulated sludge.

Becker's expert testified that restoring the capacity of the lagoons would allow four additional houses to be connected to the sewer system. Aqua Missouri's expert testified that at most ten to twelve additional houses could be served if the inflow and infiltration problem were entirely solved. Becker and other potential customer are entitled to connect new houses to the system up to the capacity of the current system. Since the evidence indicates that some new houses can be served if the existing sewer system is properly maintained and repaired, and since Aqua Missouri is unaware of the capacity of its system, the Commission will need to make a determination of how many new houses can be added to the system. Based on the evidence presented to it, the Commission's best estimate is that ten new houses can be connected to the system. Aqua Missouri will be ordered to connect up to ten new houses to the existing sewer system. Those ten new houses are to be allocated on a first-come, first-served basis, with Becker to be treated on the same basis as any other potential customer.

b) Has Aqua Missouri violated its tariff by refusing to provide service to Becker unless Becker enters into a Developer Agreement with Aqua Missouri?

As indicated in the previous discussion, Aqua Missouri's tariffs do not allow the utility to refuse to provide service to any customer, including a

developer, so long as that customer can be served using existing capacity. Becker does not need to enter into a developer agreement to utilize that existing capacity. However, Aqua Missouri's tariff does require Becker, or any other developer, to enter into a developer agreement in order to develop additional property that will require the creation of additional sewer capacity, either through the building of new treatment facilities or the expansion of current facilities.

c) What steps, if any, must Becker take to receive service from Aqua Missouri?

Becker has done everything necessary to receive service for the ten additional houses that the Commission has determined can be served through the current capacity of the sewer system.

d) If an expansion of Aqua Missouri's wastewater treatment plant is necessary in order for Aqua Missouri to serve Becker, who is responsible for the cost of expansion?

As previously indicated any expansion of the wastewater treatment plant necessary to serve new development is the responsibility of the developer who proposes to build the development that necessitates the expansion. If Becker plans to develop its property in that manner, it must sign a developer agreement and agree to pay for the cost of expansion.

II. Safe and Adequate Service at Lake Carmel

a) Is Aqua Missouri presently providing safe and adequate service to its customers at Lake Carmel?

There was no evidence presented that would indicate that Aqua Missouri is not providing safe and adequate service to its current customers. There have been no DNR violations and current sewer customers are well served. With appropriate maintenance and repair of its sewer system to restore that system to its permitted capacity, Aqua Missouri should be able to provide safe and adequate service to ten additional customers.

b) Is the wastewater treatment facility at Lake Carmel presently at or over its permitted capacity?

The wastewater treatment lagoons at Lake Carmel are at or near their current operating capacity. However, with appropriate maintenance and repair of its sewer system to restore that system to its permitted capacity, Aqua Missouri should be able to provide safe and adequate service to ten additional customers.

c) If the wastewater treatment facility at Lake Carmel is not at or over its permitted capacity, how many additional homes or lots may be connected?

Ten additional lots may be connected.

d) If the wastewater treatment facility at Lake Carmel is presently over its permitted capacity, must Aqua Missouri make improvements to its facility to add capacity sufficient to meet its present load?

Aqua Missouri must appropriately maintain and repair its sewer system to restore that system to its permitted capacity.

III. Aqua Missouri's Tariff

Does the public interest or the law require that Aqua Missouri amend or modify its tariff so that individuals and developers will be treated similarly with respect to extensions?

As interpreted by the Commission, Aqua Missouri's tariff is reasonable and is consistent with Missouri law and the regulations of this Commission. It does not need to be changed.

IT IS ORDERED THAT:

1. Aqua Missouri, Inc. shall connect up to ten additional houses to its sewer system at the Lake Carmel subdivision. Applications to connect additional houses shall be granted on a first-come, first-served basis, with Jason Becker and Becker Development Company treated the same as all other applicants.

2. If Jason Becker and Becker Development Company wish to develop additional land and thereby require an expansion of the sewer system, Jason Becker and Becker Development Company must sign a developer agreement as required by Aqua Missouri's tariff.

3. This Report and Order shall become effective on August 11, 2007.

Davis, Chm., Clayton and Appling, CC., concur;
Murray and Gaw, CC., dissent;
and certify compliance with the provisions
of Section 536.080, RSMo 2000.

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In the Matter of the Consideration of the Adoption of the PURPA 111(d)(12) Fuel Sources Standard as Required by Section 1251 of the Energy Policy Act of 2005

In the Matter of the Consideration of Adoption of the PURPA Section 111(d)(13) Fossil Fuel Generation Efficiency Standard as Required by Section 1251 of the Energy Policy Act of 2005

*Case No. EO-2006-0494 and EO-2006-0495
Decided July 12, 2007*

Evidence, Practice and Procedure §1. The Commission did not adopt the Fuel Sources Standard because the prior state action applied given that the Commission already adopted comparable rules.

APPEARANCES

James M. Fischer, Attorney at Law, Fischer & Dority, 101 Madison Street, Suite 400, Jefferson City, Missouri 65101, for Kansas City Power & Light Company.

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Steven Dottheim, Chief Deputy General Counsel, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Harold Stearley, Judge.

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REPORT AND ORDER

Syllabus: This Report and Order delineates the final disposition of two workshop cases involving new Public Utility Regulatory Policy Act ("PURPA") standards propagated by the federal government in the Energy Policy Act of 2005 ("EPAAct").

Procedural History

On June 22, 2006, the Staff of the Missouri Public Service Commission filed motions requesting that the Commission establish cases, provide notice, set intervention deadlines and schedule a prehearing conference for the purpose of determining whether to adopt the Fuel Sources Standard and the Fossil Fuel Generation Efficiency Standard, both established in Section 1251 of EPAAct. The Commission granted Staff's motions on June 23, 2006. A deadline was set for intervention and numerous entities intervened.

A prehearing was held in these matters on August 4, 2006, and a technical conference followed on September 22, 2006. On September 29, 2006, the Staff filed "Suggestions Regarding Future Proceedings." The parties were given until October 13, 2006, to respond to Staff's suggestions. Numerous parties responded. Many suggested that the cases could be dismissed asserting the Commission had already taken sufficient action to comply with the new federal standards.

On October 16, 2006, the Commission directed its Staff to file a motion for a final order of rulemaking requesting that the Commission open a single rulemaking case to determine if any of the Commission's prior actions applied to these standards and to proceed with rulemaking if so required. The parties responded and on December 22, 2006, the Staff retracted its motion to open a rulemaking docket and instead requested the Commission make a threshold determination as to whether prior Commission or legislative action applied to these standards.

A provision in EPAAct directs state commissions not to take any action regarding the new standards if that commission, or that state's legislature, had taken any prior action to consider or implement a comparable standard. A decision by the Commission that prior state action satisfied EPAAct's consideration/implementation requirement would terminate these proceedings, while an opposite decision would require the Commission to decide if rulemaking or other action was required to adopt the standards.

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On December 26, 2006, the Commission set a date for the parties to specifically address the threshold question on the applicability of the prior state action exemption to the adoption of the Fuel Sources Standard and the Fossil Fuel Generation Efficiency Standard. The parties were given until February 9, 2007, to file these additional responses and fully articulate their positions on this threshold issue.

On February 16, 2007, after reviewing all of the parties' responses, the Commission set these matters for an On-the-Record Presentation to take testimony from counsel and subject matter experts representing all of the interested parties. The Commission held its On-the-Record Presentation on April 27, 2007 and took testimony on whether the prior state action exemption applied to these PURPA standards. These two matters were not formally consolidated; however, because the Commission heard arguments on these matters simultaneously, it is issuing the decision in these matters in one Report and Order.

Findings of Fact

With the exception of delineating the exact language of the standards in question and the parties' positions regarding those standards, both factual recitations, the Missouri Public Service Commission's determination as to whether the prior state action exemption applies to these standards is purely a determination of law. Consequently, no additional findings of fact, beyond what the Commission has outlined below, are required.

The PURPA Standards

The new standards enacted with EPAct that the Commission is considering in this Report and Order are:

The Fuel Sources Standard - PURPA Section 111(d)(12):

Each electric utility shall develop a plan to minimize dependence on one fuel source and to ensure that the electric energy it sells to consumers is generated using a diverse range of fuels and technologies, including renewable technologies.

The Fossil Fuel Generation Efficiency Standard - PURPA Section 111(d)(13)

Each electric utility shall develop and implement a 10-year plan to increase the efficiency of its fossil fuel generation.

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Prior State Action Exemption Standard

The original language from PURPA Section 111, when enacted in 1978 provided a procedure for state commissions to follow when considering and making determinations on whether to adopt the federal standards. That procedure is applicable to the newly enacted PURPA sections, unless the defined prior state action exemption (defined in detail later in this order) is applicable. The procedure for consideration and determination of the new PURPA standards is as follows:

PURPA SECTION 111(16 U.S.C. § 2621) Consideration and determination respecting certain ratemaking standards

(a) Consideration and determination

Each State regulatory authority (with respect to each electric utility for which it has ratemaking authority) and each nonregulated electric utility shall consider each standard established by subsection (d) of this section and make a determination concerning whether or not it is appropriate to implement such standard to carry out the purposes of this chapter. For purposes of such consideration and determination in accordance with subsections (b) and (c) of this section, and for purposes of any review of such consideration and determination in any court in accordance with section 2633 of this title, the purposes of this chapter supplement otherwise applicable State law. **Nothing in this subsection prohibits any State regulatory authority or nonregulated electric utility from making any determination that it is not appropriate to implement any such standard, pursuant to its authority under otherwise applicable State law.**

(b) Procedural requirements for consideration and determination

(1) The consideration referred to in subsection (a) of this section shall be made after public notice and hearing. The

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determination referred to in subsection (a) of this section shall be—

(A) in writing,

(B) based upon findings included in such determination and upon the evidence presented at the hearing, and

(C) available to the public.

(2) Except as otherwise provided in paragraph (1), in the second sentence of section 2622 (a) of this title, and in sections 2631 and 2632 of this title, the procedures for the consideration and determination referred to in subsection (a) of this section shall be those established by the State regulatory authority or the nonregulated electric utility.

(c) Implementation

(1) The State regulatory authority (with respect to each electric utility for which it has ratemaking authority) or nonregulated electric utility **may, to the extent consistent with otherwise applicable State law—**

(A) **implement** any such standard determined under subsection (a) of this section to be appropriate to carry out the purposes of this chapter, or

(B) **decline to implement** any such standard.

(2) If a State regulatory authority (with respect to each electric utility for which it has ratemaking authority) or nonregulated electric utility declines to implement any standard established by subsection (d) of this section which is determined under subsection (a) of this section to be appropriate to carry out the purposes of this chapter, such authority or nonregulated electric utility shall state in writing the reasons therefor. Such statement of reasons shall be available to the public.

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(3) If a State regulatory authority implements a standard established by subsection (d)(7) or (8) of this section, such authority shall—

(A) consider the impact that implementation of such standard would have on small businesses engaged in the design, sale, supply, installation or servicing of energy conservation, energy efficiency or other demand side management measures, and

(B) implement such standard so as to assure that utility actions would not provide such utilities with unfair competitive advantages over such small businesses.

It is important to note that PURPA Section 111 only requires the Commission to consider the new standards.¹ Implementation is discretionary, and complete exemption from subsections (b) and (c) above exists if a state legislature or commission has taken prior action to consider or implement a comparable standard. The applicable exemption language for PURPA standards 111(d)(12) and (13) is set forth in PURPA Sections 112 (d), corresponding to Sections 16 U.S.C. §2622(d), which provides, as summarized below:

Prior State Actions –

Subsections (b) Procedural requirements for consideration and determination, and (c) Implementation:

shall not apply to the standard established by paragraphs (11) through (13) of section 111(d) [16 U.S.C. Section 2621(d)(11)-(13)] of this title;

in the case of any electric utility in a State if, before the enactment of these subsections [Enacted August 8, 2005] -

-

(1) the State has implemented for such utility the standard concerned (or a comparable standard);

¹ PURPA Section 111(a), (b), and (c) (16 U.S.C. § 2621(a), (b), and (c)).

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(2) the State regulatory authority for such State or relevant nonregulated electric utility has conducted a proceeding to consider implementation of the standard concerned (or a comparable standard) for such utility; or

(3) the State legislature has voted on the implementation of such standard (or a comparable standard) for such utility.

Comparability Standard

The Commission must decide if it, or the Missouri legislature considered, voted upon or implemented a comparable standard to determine if the prior state action exemption applies. PURPA Section 124 offers guidance for determining if a "comparable" standard has been considered that would constitute prior state action and exempt or prohibit the Commission from taking any further action in relation to the newly adopted standards. That section provides:

PURPA SECTION 124 (16 U.S.C. § 2634) Prior and pending proceedings

For purposes of subchapters I and II of this chapter, and this subchapter, proceedings commenced by State regulatory authorities (with respect to electric utilities for which it has ratemaking authority) and nonregulated electric utilities before November 9, 1978, and actions taken before such date in such proceedings shall be treated as complying with the requirements of subchapters I and II of this chapter, and this subchapter if such proceedings and actions **substantially conform** to such requirements. For purposes of subchapters I and II of this chapter, and this subchapter, any such proceeding or action commenced before November 9, 1978, but not completed before such date, shall comply with the requirements of subchapters I and II of this chapter, and this subchapter, to the maximum extent practicable, with respect to so much of such proceeding or action as takes place after such date, except as otherwise provided in section 2631 (c) of this title. In the case of each standard established by paragraphs (11) through (13) of section 111(d), the reference contained in this subsection to the date of enactment of this Act shall be deemed to be a

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reference to the date of enactment of such paragraphs (11) through (13). In the case of the standard established by paragraph (14) of section 111(d), the reference contained in this subsection to the date of enactment of this Act shall be deemed to be a reference to the date of enactment of such paragraph (14). In the case of each standard established by paragraph (15) of section 111(d), the reference contained in this subsection to the date of enactment of the Act shall be deemed to be a reference to the date of enactment of paragraph (15).

Substantial is defined as relating to, or having substance; material; true or real; not imaginary; not illusive.² Consequently, for a comparable consideration to have occurred, the Commission, or the State Legislature, must have considered a law or regulation sufficiently similar in substance to the new PURPA regulations as to trigger the prior state action exemption.

The Parties' Positions

The parties have essentially divided asserting two opposing positions or legal arguments in these matters. Those positions are summarized as follows:

The Fuel Sources Standard - PURPA Section 111(d)(12):

Staff, The Empire District Electric Company, Union Electric Company, d/b/a AmerenUE, Aquila, Inc., Kansas City Power and Light Company (collectively "Staff and the Utilities") all believe this case can be closed based upon prior state actions. These parties argue that the Electric Utility Resource Planning Chapter of the Commission's Rules, 4 CSR 240-22, i.e. the Integrated Resource Planning (IRP) Rules, set out minimum standards for each electric utility's resource planning process.³ The IRP

² Black's Law Dictionary, Sixth Edition, West Publishing Co., 1990, p. 1428; The American Heritage College dictionary, 3rd Edition, Houghton Mifflin Company, 1993, p. 1354.

³ See Testimony of Daniel I. Beck, Commission's Supervisor of Engineering Analysis; David W. Gibson, Empire's VP of Regulatory & General Services; Richard Voytas, Ameren's Manager of Corporate Analysis; J. Matt Tracy, Aquila's Manager of Regulatory Services; Randy L. Hughes, KCPL's Manager of Resource Planning, Transcript pp. 13-25, pp. 48-82. See also comments of Attorneys: Steve Dottheim, Attorney for the Commission's Staff; Tom Byrne, Attorney for AmerenUE; James M. Fischer, Attorney for KCP&L; Diana C. Carter, Attorney for Aquila, Inc and Empire, Transcript pp. 13-25, pp. 48-82. See also 4 CSR 240-22.010 - .080, in particular .040 in its entirety and .070(9), (10), and specifically (10)(B) – as they interrelate to .060 and .010(2).

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rules require that utilities analyze the risks associated with various uncertainties and select a strategy that provides the appropriate balance between minimization of expected utility costs and other considerations.⁴ The risk analysis and strategy selection process address fuel diversity and considers the benefits of renewables, especially related to future environmental regulation.⁵ Staff and the Utilities observe that the utilities must adopt a preferred resource plan, considering renewables, and adopt an implementation plan for the resource plan.⁶ Staff and the Utilities believe that promulgation and adoption of the Commission's IRP Rules constitute prior state action and that no further action is required by the Commission with regard to this standard.⁷

DNR, Concerned Citizens of Platte County, Sierra Club, Ozark Energy Services, Mid-Missouri Peaceworks, Burroughs Audubon Society and Heartland Renewable Energy Society (collectively "Concerned Citizens") all believe the Commission should engage in rulemaking to comply with this standard.⁸ These parties claim that Section 1251 of EPAct explicitly requires that the "diverse range of fuels and technologies" included in the utility's fuel sources plan "must include renewable technologies" and that the Commission's Electric Utility Resource Planning Rules only require the utility to consider renewable technologies in its planning analysis, but do not require the utility's preferred resource plan to include renewable technologies.⁹

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* Additionally company tariffs, implementing any portion of a utility's IRPs, that are reviewed and approved by the Commission, also constitute prior state action and negate the need for further action by the Commission in this matter. Tariffs, once reviewed and approved by the Commission, have the same force and effect as state statutes. *A.C. Jacobs and Company v. Union Electric Company*, 17 S.W.3d 579, 581 (Mo. App. 2000); *State ex rel. St. Louis County Gas Co. v. Public Service Commission of Missouri*, 286 S.W. 84, 86, (Mo. 1926); *Wheelock v. Walsh Fire Clay Products Co.*, 60 F.2d 415 (8th Circuit 1932); *Updike Grain Co. v. Chicago & N.W. Ry. Co.*, 35 F.2d 486 (8th Circuit 1929); *Chicago, R. I. & P. R. Co. v. Furniture Forwarders of St. . . .*, 267 F.Supp. 175 (D.C. Mo. 1967).

⁸ It should be noted that Concerned Citizens of Platte County, Sierra Club, Ozark Energy Services, Mid-Missouri Peaceworks, Burroughs Audubon Society and Heartland Renewable Energy Society did not make an appearance at the On-the-Record Proceeding. These parties did, however, present their legal arguments to the Commission in their pleadings throughout the pendency of these matters. Their arguments essentially mirrored DNR's arguments and DNR was represented by counsel at the On-the-Record Proceeding.

⁹ See Testimony of John Noller, Energy Policy Analyst/Planner, Missouri Energy Center for DNR. Transcript pp. 13-25, pp. 48-82. See also comments of Attorney: Shelley A. Woods, Attorney for DNR; Transcript pp. 13-25, pp. 48-82.

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The Fossil Fuel Generation Efficiency Standard - PURPA Section 111(d)(13):

Staff and the Utilities believe this case can be closed based upon prior state actions. These parties argue that the Electric Utility Resource Planning Chapter of the Commission's Rules, 4 CSR 240-22, i.e. the IRP rules, require a minimum of a 20-year planning horizon, which results in a more thorough analysis than described in PURPA Section 111(d)(13).¹⁰ The IRP rules specifically require "life extension and refurbishment at existing generation plants; enhancement of the emission controls at existing or new generation plants;" and "efficiency improvements which will reduce the utility's own use of energy."¹¹ In addition, the IRP rules require analysis of new generation (including fossil fuel plants) in order to meet resource needs and to determine the manner in which this new generation affects the utility's overall fossil fuel generation efficiency.¹² The IRP rules also address fuel choices and environmental regulations through the risk analysis portion of the rules.¹³ Staff and the Utilities again observe that the utilities must adopt a preferred resource plan, considering renewables, and adopt an implementation plan for the resource plan, and again, believe that promulgation and adoption of the Commission's IRP Rules constitute prior state action and that no further action is required by the Commission with regard to this standard.¹⁴

The Concerned Citizens believe the Commission should engage in rulemaking to comply with this standard. These parties claim that while Missouri's resource planning rule, 4 CSR 240-22-040(1), requires regulated utilities to analyze opportunities for fossil fuel generation efficiency during the course of their resource planning process, it does not require that the preferred resource plan or resource acquisition strategy adopted by the

¹⁰ See Testimony of Daniel I. Beck, PSC's Supervisor of Engineering Analysis; David W. Gibson, Empire's VP of Regulatory & General Services; Richard Voytas, Ameren's Manager of Corporate Analysis; J. Matt Tracy, Aquila's Manager of Regulatory Services; Randy L. Hughes, KCPL's Manager of Resource Planning. Transcript pp. 77-82, and 95-105. See also comments of Attorneys: Steve Dottheim, Attorney for the Commission's Staff; James M. Fischer, Attorney for KCP&L; Diana C. Carter, Attorney for Aquila, Inc and Empire, Transcript pp. 77-82, and 95-105. See also 4 CSR 240-22.010 - .080, in particular .060 in its entirety and specifically .040(4)-(8) and .060(4); and CSR 240-22.070(9) and (10) generally and (10)(B) – as they interrelate to .060 and .010(2) – implementation is actually required.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* Additionally company tariffs, implementing any portion of a utility's IRPs, that are reviewed and approved by the Commission, also constitute prior state action and negate the need for further action by the Commission in this matter. See Footnote Number 7.

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utility include activities to increase the efficiency of the utility's fossil fuel generating resources or that the plan be implemented.¹⁵

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

The Fuel Sources Standard - PURPA Section 111(d)(12):

The Commission's IRP rules, set out minimum standards for each electric utility's resource planning process. The IRP rules require that utilities analyze the risks associated with various uncertainties and select a strategy that provides the appropriate balance between minimization of expected utility costs and other considerations. The risk analysis and strategy selection process addresses fuel diversity and considers the benefits of renewable technologies, including hydro, wind, solar, biomass and others, especially related to future environmental regulation. Staff and the Utilities correctly observe that the utilities must adopt a preferred resource plan, considering renewables, and adopt an implementation plan for the resource plan.¹⁶ The Commission's promulgation and adoption of the IRP rules satisfy the prior state action exemption and no further Commission action is required to implement this federal standard.¹⁷

The Fossil Fuel Generation Efficiency Standard - PURPA Section 111(d)(13):

The Commission's IRP Rules require a minimum 20-year planning horizon, which results in a more thorough analysis than described in PURPA Section 111(d)(13). The IRP rules specifically require "life extension and refurbishment at existing generation plants; enhancement of the emission controls at existing or new generation plants;" and "efficiency improvements which will reduce the utility's own use of energy." In addition, the IRP rules require analysis of new generation (including fossil fuel plants) in order to meet resource needs and to determine the manner in which this new generation affects the utility's overall fossil fuel generation efficiency. The IRP rules also address fuel choices and environmental regulations through the risk analysis portion of the rules. The IRP rules also require risk analysis, strategy selection and an implementation plan for the preferred

¹⁵ See Testimony of John Noller, Energy Policy Analyst/Planner, Missouri Energy Center for DNR. Transcript pp. 77-82, and 95-105. See also the pleadings of DNR, Concerned Citizens of Platte County, Sierra Club, Ozark Energy Services, Mid-Missouri Peaceworks and Heartland Renewable Energy Society throughout the pendency of these matters.

¹⁶ See 4 CSR 240-22.010 - .080, in particular .040 in its entirety and .070(9), (10), and specifically (10)(B) – as they interrelate to .060 and .010(2).

¹⁷ Additionally, company tariffs that implement IRPs in any way, which are reviewed and approved by the Commission, constitute prior state action by the Commission and negate the need for further action by the Commission in this matter. See Footnote Number 7.

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resource plan.¹⁸ Consequently, the Commission's promulgation and adoption of the IRP rules satisfy the prior state action exemption, and no further Commission action is required to implement this federal standard.

Decision

The Commission in making this decision has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision. After applying the facts, as it has found them, to its conclusions of law, the Commission has reached the following decision.

The Commission will close Case Nos. EO-2006-0494 and EO-2006-0495, finding that the prior state action exemption applies and that no further action is required by the Commission with relation to these two matters.

IT IS ORDERED THAT:

1. Case Number EO-2006-0494, In the Matter of the Consideration of Adoption of the PURPA Section 111(d)(12) Fuel Sources Standard as Required by Section 1251 of the Energy Policy Act of 2005, is closed.
2. Case Number EO-2006-0495, In the Matter of the Consideration of Adoption of the PURPA Section 111(d)(13) Fossil Fuel Generation Efficiency Standard as Required by Section 1251 of the Energy Policy Act of 2005, is closed.
3. This order shall become effective on July 22, 2007.

Davis, Chm., Murray and Appling, CC., concur;
Gaw and Clayton, CC., dissent;
and certify compliance with the provisions
of Section 536.080, RSMo 2000.

¹⁸ See 4 CSR 240-22.010 - .080, in particular .060 in its entirety and specifically .040(4)-(8) and .060(4); and CSR 240-22.070(9) and (10) generally and (10)(B) – as they interrelate to .060 and .010(2) – implementation is actually required. See also footnote Number 17.

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In the Matter of the Consideration of Adoption of the PURPA Section 111(d)(11) Net Metering Standard as Required by Section 1251 of the Energy Policy Act of 2005

In the Matter of the Consideration of Adoption of the PURPA Section 111(d)(14) Time-Based Metering and Communications Standard as Required by Section 1252 of the Energy Policy Act of 2005

In the Matter of the Consideration of Adoption of the PURPA Section 111(d)(15) Interconnection Standard as Required by Section 1254 of the Energy Policy Act of 2005

*Case Nos. EO-2006-0493, EO-2006-0496, and EO-2006-0497
Decided July 12, 2007*

Electric §14. The Commission did not adopt the Net Metering Standard because the prior state action applied given that the Commission already adopted comparable rules.

APPEARANCES

James M. Fischer, Attorney at Law, Fischer & Dority, 101 Madison Street, Suite 400, Jefferson City, Missouri 65101, for Kansas City Power & Light Company.

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Lewis R. Mills, Jr., Legal Counsel, Office of the Public Counsel, Governor Office Building, Post Office Box 2230, Jefferson City, Missouri 65102, for Office of the Public Counsel and the Public.

Steven Dottheim, Chief Deputy General Counsel, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Harold Stearley, Judge.

REPORT AND ORDER

Syllabus: This Report and Order delineates the final disposition of three workshop cases involving new Public Utility Regulatory Policy Act ("PURPA") standards propagated by the federal government in the Energy Policy Act of 2005 ("EPAAct").

Procedural History

On June 22, 2006, the Staff of the Missouri Public Service Commission filed motions requesting that the Commission establish cases, provide notice, set intervention deadlines and schedule a prehearing conference for the purpose of determining whether to adopt the Net Metering Standard established in Section 1251 of EPAAct, the Time-Based Metering and Communications Standard established in Section 1252 of EPAAct, and the Interconnection Standard established in Section 1254 of EPAAct. The Commission granted Staff's motions on June 23, 2006. A deadline was set for intervention and numerous entities intervened.

A prehearing was held in these matters on August 4, 2006, and a technical conference followed on September 22, 2006. On September 29, 2006, the Staff filed "Suggestions Regarding Future Proceedings." The parties were given until October 13, 2006, to respond to Staff's suggestions. Numerous parties responded. Many suggested that the cases could be dismissed asserting the Commission had already taken sufficient action to comply with the new federal standards.

On October 16, 2006, the Commission directed its Staff to file a motion for a final order of rulemaking requesting that the Commission open a single rulemaking case to determine if any of the Commission's prior actions applied to these standards and to proceed with rulemaking if so required. The parties responded and on December 22, 2006, the Staff retracted its motion to open a rulemaking docket and instead requested the Commission make a threshold determination as to whether prior Commission or legislative action applied to these standards.

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A provision in EPAct directs state commissions not to take any action regarding the new standards if that commission, or that state's legislature, had taken any prior action to consider or implement a comparable standard. A decision by the Commission that prior state action satisfied EPAct's consideration/implementation requirement would terminate these proceedings, while an opposite decision would require the Commission to decide if rulemaking or other action was required to adopt the standards.

On December 26, 2006, the Commission set a date for the parties to specifically address the threshold question on the applicability of the prior state action exemption to the adoption of the Net Metering Standard, the Time-Based Metering and Communications Standard, and the Interconnection Standard. The parties were given until February 9, 2007, to file these additional responses and fully articulate their positions on this threshold issue.

On February 16, 2007, after reviewing all of the parties' responses, the Commission set these matters for an On-the-Record Presentation to take testimony from counsel and subject matter experts representing the interested parties. The Commission held its On-the-Record Presentation on April 25, 2007, and took testimony on whether the prior state action exemption applied to these three PURPA standards. These three matters were not formally consolidated; however, because the Commission heard arguments on these matters simultaneously, it is issuing the decision in these matters in one Report and Order.

Findings of Fact

With the exception of delineating the exact language of the standards in question, and the parties' positions regarding those standards, both factual recitations, the Commission's determination as to whether the prior state action exemption applies to these standards is purely a determination of law. Consequently, no additional findings of fact, beyond what the Commission has outlined below, are required.

The PURPA Standards

The new PURPA standards enacted with EPAct that the Commission is considering in this Report and Order are:

The Net Metering Standard - PURPA Section 111(d)(11):

Each electric utility shall make available upon request net metering service to any electric consumer that the electric utility serves. For purposes of this paragraph, the term 'net metering service' means service to an electric consumer

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under which electric energy generated by that electric consumer from an eligible on-site generating facility and delivered to the local distribution facilities may be used to offset electric energy provided by the electric utility to the electric consumer during the applicable billing period.

The Time-Based Metering Standard - PURPA Section 111(d)(14):

The Commission is required make a determination whether:

(A) ... [E]ach electric utility shall offer each of its customer classes, and provide individual customers upon customer request, a time-based rate schedule under which the rate charged by the electric utility varies during different time periods and reflects the variance, if any, in the utility's costs of generating and purchasing electricity at the wholesale level. The time-based rate schedule shall enable the electric consumer to manage energy use and cost through advanced metering and communications technology.

(B) The types of time-based rate schedules that may be offered under the schedule referred to in subparagraph (A) include, among others—

(i) time-of-use pricing whereby electricity prices are set for a specific time period on an advance or forward basis, typically not changing more often than twice a year, based on the utility's cost of generating and/or purchasing such electricity at the wholesale level for the benefit of the consumer. Prices paid for energy consumed during these periods shall be pre-established and known to consumers in advance of such consumption, allowing them to vary their demand and usage in response to such prices and manage their energy costs by shifting usage to a lower cost period or reducing their consumption overall;

(ii) critical peak pricing whereby time-of-use prices are in effect except for certain peak days, when prices may

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reflect the costs of generating and/or purchasing electricity at the wholesale level and when consumers may receive additional discounts for reducing peak period energy consumption;

(iii) real-time pricing whereby electricity prices are set for a specific time period on an advanced or forward basis, reflecting the utility's cost of generating and/or purchasing electricity at the wholesale level, and may change as often as hourly; and

(iv) credits for consumers with large loads who enter into pre-established peak load reduction agreements that reduce a utility's planned capacity obligations.

(C) Each electric utility subject to subparagraph (A) shall provide each customer requesting a time-based rate with a time-based meter capable of enabling the utility and customer to offer and receive such rate, respectively.

The Interconnection Standard - PURPA Section 111(d)(15):

Each electric utility shall make available, upon request, interconnection service to any electric consumer that the electric utility serves. For purposes of this paragraph, the term 'interconnection service' means service to an electric consumer under which an on-site generating facility on the consumer's premises shall be connected to the local distribution facilities. Interconnection services shall be offered based upon the standards developed by the Institute of Electrical and Electronics Engineers: IEEE Standard 1547 for Interconnecting Distributed Resources with Electric Power Systems, as they may be amended from time to time. In addition, agreements and procedures shall be established whereby the services are offered shall promote current best practices of interconnection for distributed generation, including but not limited to practices stipulated in model codes adopted by associations of state regulatory agencies. All such agreements and procedures

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shall be just and reasonable, and not unduly discriminatory or preferential.

Prior State Action Exemption Standard

The original language from PURPA Section 111, when enacted in 1978 provided a procedure for state commissions to follow when considering and making determinations on whether to adopt the federal standards. That procedure is applicable to the newly enacted PURPA sections, unless the prior state action exemption (defined in detail later in this order) is applicable. The procedure for consideration and determination of the new PURPA standards is as follows:

PURPA SECTION 111(16 U.S.C. § 2621) Consideration and determination respecting certain ratemaking standards

(b) Consideration and determination

Each State regulatory authority (with respect to each electric utility for which it has ratemaking authority) and each nonregulated electric utility shall consider each standard established by subsection (d) of this section and make a determination concerning whether or not it is appropriate to implement such standard to carry out the purposes of this chapter. For purposes of such consideration and determination in accordance with subsections (b) and (c) of this section, and for purposes of any review of such consideration and determination in any court in accordance with section 2633 of this title, the purposes of this chapter supplement otherwise applicable State law. **Nothing in this subsection prohibits any State regulatory authority or nonregulated electric utility from making any determination that it is not appropriate to implement any such standard, pursuant to its authority under otherwise applicable State law.**

(b) Procedural requirements for consideration and determination

(1) The consideration referred to in subsection (a) of this section shall be made after public notice and hearing. The

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determination referred to in subsection (a) of this section shall be—

(A) in writing,

(B) based upon findings included in such determination and upon the evidence presented at the hearing, and

(C) available to the public.

(2) Except as otherwise provided in paragraph (1), in the second sentence of section 2622 (a) of this title, and in sections 2631 and 2632 of this title, the procedures for the consideration and determination referred to in subsection (a) of this section shall be those established by the State regulatory authority or the nonregulated electric utility.

(c) Implementation

(1) The State regulatory authority (with respect to each electric utility for which it has ratemaking authority) or nonregulated electric utility **may, to the extent consistent with otherwise applicable State law—**

(A) **implement** any such standard determined under subsection (a) of this section to be appropriate to carry out the purposes of this chapter, or

(B) **decline to implement** any such standard.

(2) If a State regulatory authority (with respect to each electric utility for which it has ratemaking authority) or nonregulated electric utility declines to implement any standard established by subsection (d) of this section which is determined under subsection (a) of this section to be appropriate to carry out the purposes of this chapter, such authority or nonregulated electric utility shall state in writing the reasons therefor. Such statement of reasons shall be available to the public.

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(3) If a State regulatory authority implements a standard established by subsection (d)(7) or (8) of this section, such authority shall—

(A) consider the impact that implementation of such standard would have on small businesses engaged in the design, sale, supply, installation or servicing of energy conservation, energy efficiency or other demand side management measures, and

(B) implement such standard so as to assure that utility actions would not provide such utilities with unfair competitive advantages over such small businesses.

It is important to note that PURPA Section 111 only requires the Commission to consider the new standards.¹ Implementation is discretionary, and complete exemption from subsections (b) and (c) above exists if a state legislature or commission has taken prior action to consider or implement a comparable standard. The applicable exemption language for PURPA standards 111(d)(11), (14) and (15) is set forth in PURPA Sections 112 (d), (e), and (f), corresponding to Sections 16 U.S.C. §2622(d), (e) and (f), which are summarized below:

Prior State Actions –

Subsections (b) Procedural requirements for consideration and determination, and (c) Implementation:

shall not apply to the standard established by paragraphs (11) through (13) of section 111(d) [16 U.S.C. Section 2621(d)(11)-(13)] of this title;

shall not apply to the standard established by paragraphs (14) of section 111(d) [16 U.S.C. Section 2621(d)(14)] of this title; and,

¹ PURPA Section 111(a), (b), and (c) (16 U.S.C. § 2621(a), (b), and (c)); Transcript p. 61, lines 1-6.

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shall not apply to the standard established by paragraphs (15) of section 111(d) [16 U.S.C. Section 2621(d)(15)] of this title:

in the case of any electric utility in a State if, before the enactment of these subsections [Enacted August 8, 2005] -

(1) the State has implemented for such utility the standard concerned (or a comparable standard);

(2) the State regulatory authority for such State or relevant nonregulated electric utility has conducted a proceeding to consider implementation of the standard concerned (or a comparable standard) for such utility; or

(3) the State legislature has voted on the implementation of such standard (or a comparable standard) for such utility.

Comparability Standard

The Commission must decide if it or the Missouri legislature considered, voted upon, or implemented a comparable standard to determine if the prior state action exemption applies. PURPA Section 124 offers guidance for determining if a "comparable" standard has been considered that would constitute prior state action and exempt or prohibit the Commission from taking any further action in relation to the newly adopted standards. That section provides:

PURPA SECTION 124 (16 U.S.C. § 2634) Prior and pending proceedings

For purposes of subchapters I and II of this chapter, and this subchapter, proceedings commenced by State regulatory authorities (with respect to electric utilities for which it has ratemaking authority) and nonregulated electric utilities before November 9, 1978, and actions taken before such date in such proceedings shall be treated as complying with the requirements of subchapters I and II of this chapter, and this subchapter if such proceedings and actions **substantially conform** to such requirements. For purposes of subchapters I and II of this

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chapter, and this subchapter, any such proceeding or action commenced before November 9, 1978, but not completed before such date, shall comply with the requirements of subchapters I and II of this chapter, and this subchapter, to the maximum extent practicable, with respect to so much of such proceeding or action as takes place after such date, except as otherwise provided in section 2631 (c) of this title. In the case of each standard established by paragraphs (11) through (13) of section 111(d), the reference contained in this subsection to the date of enactment of this Act shall be deemed to be a reference to the date of enactment of such paragraphs (11) through (13). In the case of the standard established by paragraph (14) of section 111(d), the reference contained in this subsection to the date of enactment of this Act shall be deemed to be a reference to the date of enactment of such paragraph (14). In the case of each standard established by paragraph (15) of section 111(d), the reference contained in this subsection to the date of enactment of the Act shall be deemed to be a reference to the date of enactment of paragraph (15).

Substantial is defined as relating to, or having substance; material; true or real; not imaginary; not illusive.² Consequently, for a comparable consideration to have occurred, the Commission, or the State Legislature, must have considered a law or regulation sufficiently similar in substance to the new PURPA regulations as to trigger the prior state action exemption.

The Parties' Positions

The parties have essentially divided asserting two opposing positions or legal arguments in these matters. Those positions are summarized as follows:

The Net Metering Standard - PURPA Section 111(d)(11):³

² Black's Law Dictionary, Sixth Edition, West Publishing Co., 1990, p. 1428; The American Heritage College dictionary, 3rd Edition, Houghton Mifflin Company, 1993, p. 1354.

³ This year, the Missouri legislature considered and enacted S.B. 54 (See also S.B. 674), a portion of which (Section 386.890) was entitled the "Easy Connection Act." This bill provides additional requirements upon electric suppliers to make net metering available to customer-generators. This bill was delivered to the Governor on May 30, 2007, but has not yet been

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Staff, The Empire District Electric Company, Union Electric Company, d/b/a AmerenUE, Aquila, Inc., Kansas City Power and Light Company ("collectively Staff and the Utilities") all believe this case can be closed based upon the Commission having taken prior state action. In 2002, the Consumer Clean Energy Act, Section 386.887 RSMo, Cum. Supp. 2006,⁴ became law in Missouri. These parties argue that this legislation clearly defines what constitutes "net metering" in Missouri, and it is not permissible for the Commission to adopt net metering provisions contrary to this statute.⁵ Consequently, the prior state action exemption applies in this case, and no further Commission activity is necessary or could be implemented in this area until such time as the legislature decides to change the applicable statute.

Additionally, Staff and the Utilities assert that while Missouri may use two meters to measure usage and generation, and prescribe a pricing schedule that compensates the utility at retail rates while providing the customer-generator avoided rates for surplus returned to the grid, this method is in fact more equitable.⁶ Staff and the Utilities claim that Missouri's system of net metering avoids the inherent problem with a one-to-one offset at the retail rate, which would, in fact, cause ratepayers to subsidize customer-generators by providing credit to the customer-generator for all of the costs associated with generation and delivery, as opposed to only the fuel component of the rate.⁷ Consequently, Staff and the Utilities assert that Missouri's Net Metering standard is the functional equivalent of any other net metering standard and is comparable the PURPA standard.⁸

signed by the Governor. Its effective date, should it be signed into law, is January 1, 2008. This legislative action has occurred after August 8, 2005, the date of enactment of the new PURPA standards. Consequently, it cannot be considered prior state action for purposes of evaluating whether the exemption applies.

⁴ All references to Section 386.877 throughout this order refer to RSMo, Cum. Supp. 2006.

⁵ RSMo Section 386.887; Transcript pp. 59-79. The Commission adopted a Net Metering Rule, 4 CSR 240-20.065, in 2003 to implement Section 386.877.

⁶ This method has also been referred to as being a "buy-retail/sell-wholesale" method. Transcript, p. 43, lines 19-25.

⁷ See the testimony of Warren T. Wood, Commission's Utility Operations Division Director; James C. Wakins, Commission's Manager, Economic Analysis; David W. Gibson, Empire's VP of Regulatory & General Services; Wilbon Cooper, AmerenUE's Manager of Rate Engineering & Analysis; J. Matt Tracy, Aquila's Manager of Regulatory Services; Transcript pp. 22-82.

⁸ *Id.* Even Patrick J. Wilson, VP Heartland & Ozark Renewable Energy Society, who takes the opposite position from Staff and the Utilities as to whether Missouri's standard satisfies the PURPA standard, testified that Missouri's metering standard is the functional equivalent of

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On the other hand, DNR, Concerned Citizens of Platte County, Sierra Club, Ozark Energy Services, Mid-Missouri Peaceworks, Burroughs Audubon Society and Heartland Renewable Energy Society ("collectively Concerned Citizens") all believe the Commission should engage in rulemaking to comply with this standard.⁹ These parties argue that Missouri's statute and rule related to "net metering" are based on a customer making a financial transaction, selling power when the customer's electrical generation from clean energy sources is in excess of immediate needs.¹⁰ In contrast, the applicable provisions of the EPAct call for the offset of electrical power between a customer-generator and the electric utility, a non-monetary exchange.¹¹ In the instances when a customer-generator produces net excess generation, it is usually forfeited and no financial purchase occurs between the utility and the customer-generator.¹²

The Concerned Citizens assert that Missouri's system is "dual-metering" not "net-metering," and because these are fundamentally different, the Commission should conclude that Section 386.887 is not comparable to the new PURPA standard, and therefore its enactment does not constitute prior state action.¹³

The Time-Based Metering Standard - PURPA Section 111(d)(14):

Staff and the Utilities all believe this case can be closed based upon prior state actions. These parties claim that all Commission regulated electric utilities offer optional time-of-day rates that change by season, with higher rates in the summer and lower rates in the winter and with higher rates during on-peak periods and lower rates during off-peak periods for all customer classes.¹⁴ Each utility also offers some form of

PURPA's Net Metering Standard, so long as, in his opinion, the electricity that goes back onto the grid is at a one-to-one offset. Transcript p. 23.

⁹ Note: The Office of Public Counsel ("OPC") concurred with DNR's position in Case Nos. 0493 and 0497. OPC did not articulate a position for Case No. 0496.

¹⁰ See the testimony of Richard Anderson, Energy Policy Analyst/Planner, Missouri Energy Center for DNR; Patrick J. Wilson, VP Heartland & Ozark Renewable Energy Society; Transcript pp. 22-82.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ See the testimony of James C. Wakins, Commission's Manager, Economic Analysis; David W. Gibson, Empire's VP of Regulatory & General Services; Wilbon Cooper, Ameren's Manager of Rate Engineering & Analysis; J. Matt Tracy, Aquila's Manager of Regulatory Services; Chris B. Giles, KCPL's VP of Regulatory Affairs; Transcript pp. 82-107. See also Commission rules 4 CSR 240-22.050, Demand-Side Resource Analysis, and 4 CSR 240-20.065(3)(E)(1), Net Metering, Time-of-use rates.

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interruptible/curtailable rate that provides credits for consumers with large loads who enter into pre-established peak load reduction agreements.¹⁵ Some, but not all, Commission-regulated electric utilities offer real-time pricing, and all have different metering options.¹⁶

Each of the rates discussed above is set forth in a tariff reviewed, authorized and implemented by action of the Commission. Therefore, according to Staff and the Utilities the prior state action exemption applies in this case and no further Commission action is required under the federal standard.¹⁷

The Concerned Citizens believe the Commission should engage in rulemaking to comply with this standard.¹⁸ These parties all assert that Missouri has not acted on or otherwise considered the same or a comparable standard and question whether individual company tariffs would constitute a comparable standard.¹⁹ Additionally, the Concerned Citizens question whether a company tariff encompassing a time-based rate schedule also enables electric consumers to manage costs through advanced metering and communications technology.²⁰

AARP, who intervened solely in this matter and not in the other cases being addressed in this order, did not articulate a particular position on this standard. AARP simply asks that whatever the Commission decides that participation with time-based metering should remain voluntary for consumers.

The Interconnection Standard - PURPA Section 111(d)(15):

Staff and the Utilities all believe that compliance tariffs would satisfy the requirements of this standard and would constitute sufficient action eliminating the need for any rulemaking proceeding. These parties assert the Consumer Clean Energy Act, Section 386.887 required the Commission to adopt a net metering rule; i.e. the Commission's Net Metering Rule (4 CSR 240-20.065).²¹ Additionally, the Commission's Cogeneration Rule, 4

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* See also the pleadings of these parties filed throughout the pendency of these matters.

¹⁸ DNR is not a party to this case and not part of the Concerned Citizens for the purposes of EO-2006-0496.

¹⁹ See testimony of Patrick J. Wilson, VP of Heartland & Ozark Renewable Energy Society, and comments of Henry Robertson, Attorney for Great Rivers Environmental Law Center; Transcript pp. 82-107.

²⁰ *Id.*

²¹ See the testimony of Warren T. Wood, Commission's Utility Operations Division Director; Transcript pp. 107-117.

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CSR 240-20.060, is interrelated to the Net Metering Rule laying out additional requirements for interconnection in relation to net metering.

Since the adoption of 4 CSR 240-20.065, a new Institute of Electrical Electronics Engineers ("IEEE") standard has been developed; the IEEE 1547 "Interconnecting Distributed Resources with Electric Power Systems." While the Commission adoption of the net metering provisions of 4 CSR 240-20.065, including the prior IEEE standard, and the cogeneration provisions of 4 CSR 240-20.060 would constitute prior state action on this standard, the change in IEEE standards renders the prior state action exemption partially inapplicable to the interconnection provisions of this rule.²² In order to adopt the latest applicable IEEE interconnection standard, Staff and the Utilities assert it will be necessary to either revise 4 CSR 240-20.065 or require all of the electric utilities to revise their tariffs to specifically identify compliance with IEEE 1547 as a criterion for approval of customer interconnection of a distributed generation source.²³

Staff and the Utilities also note that other standards in the Clean Energy Act do not conflict with the new IEEE 1547 standard and consumers would still be required to comply with the other standards in the statute. Thus, the new IEEE 1547 standard does not have to be the exclusive standard to be comparable to the new PURPA standard.²⁴ Additionally, while the new IEEE standard does address systems larger than the 100 kW systems encompassed in the Commission's current Net Metering Rule, adopting this would merely create a subset of net metering interconnection, which does not conflict with the Consumer Clean Energy Act.²⁵

The Concerned Citizens believe the Commission should engage in rulemaking to comply with this standard. These parties assert this PURPA standard says that interconnection "shall be offered based upon" IEEE Standard 1547. Section 386.887.7, mentions IEEE among other standard-setting agencies but is not based on IEEE 1547 to the exclusion of other standards.²⁶ The Concerned Citizens assert that in its current form IEEE

²² *Id.*

²³ *Id.*

²⁴ *Id.* Section 386.877.7 requires that in addition to the IEEE Codes, each qualified net metering unit used by a customer-generator must meet the interconnection standards established by the Commission, the national Electrical Safety Code, National Electrical Code and Underwriters Laboratories.

²⁵ *Id.*

²⁶ See the testimony of Richard Anderson, Energy Policy Analyst/Planner, Missouri Energy Center for DNR; Frank Cunningham, Energy Engineer, Missouri Energy Center for DNR; Transcript pp. 107-117.

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1547 is supposed to be the uniform standard for interconnection of small systems. The Concerned Citizens claim the new standard creates a conflict with Section 386.877.²⁷ Additionally, the Concerned Citizens express concern with the 100 kW system restrictions in the Commission's current Net Metering Rule.²⁸

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

The Net Metering Standard - PURPA Section 111(d)(11):

In 2002, when enacting Section 386.887, the Missouri legislature defined what constitutes net metering for Missouri regulated utilities and it is not permissible for the Commission to adopt net metering provisions contrary to this statute. The Commission also finds that Section 386.887 is a comparable standard to the new EPAct standard. Moreover, in response to the enactment of this section, the Commission adopted compliant cogeneration and net metering rules, 4 CSR 240-20.060 and 4 CSR 240-20.065, respectively.²⁹ The prior state action exemption is satisfied by either of the actions taken by the legislature or the Commission, and no further Commission action is necessary in this area until such time as the legislature decides to change the applicable statute.

The Time-Based Metering Standard - PURPA Section 111(d)(14):

The Commission's Electric Utility Resource Planning Rules (4 CSR 240-22) require each electric utility to identify and evaluate energy-management measures (devices, technologies, rate structures, or operating procedures) that make it possible to alter the time pattern of electricity usage so as to require less generating capacity or to allow the electric power to be supplied from more fuel-efficient generating units. Specifically, Commission Rules 4 CSR 240-22.050, Demand-Side Resource Analysis, and 4 CSR 240-20.065(3)(E)(1), Net Metering, Time-of-use rates, require the regulated utilities to evaluate and develop demand-side programs and offer guidance on the application of time-of-use rates.

Adoption of these rules constitutes prior state action on the part of the Commission; however, to the extent these rules may not fully encompass the provisions of the new PURPA standard, individual company tariffs completely satisfy the standard. All Commission regulated electric utilities offer optional time-of-day rates that change by season, with higher rates in the summer and lower rates in the winter and with higher rates

²⁷ *Id.*

²⁸ *Id.* See also the pleadings of these parties filed throughout the pendency of these matters.

²⁹ The rules became effective on April 30, 2003 and August 30, 2003, respectively.

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during on-peak periods and lower rates during off-peak periods for all customer classes. Each utility also offers some form of interruptible/curtailable rate that provides credits for consumers with large loads who enter into pre-established peak load reduction agreements. Some, but not all, Commission-regulated electric utilities offer real-time pricing, and all have different metering options.

The rates for these services are set forth in tariffs reviewed, authorized and implemented by action of the Commission. Tariffs, once reviewed and approved by the Commission, have the same force and effect as state statutes.³⁰ Review and approval of the tariffs constitutes prior state action per the guidelines of the exemption, and no further Commission activity is required under the federal standard.

The Interconnection Standard - PURPA Section 111(d)(15):

The Consumer Clean Energy Act, Section 386.887 became effective on August 28, 2002, and this legislation required the Commission to adopt a net metering rule. Subsequent rulemaking resulted in the Commission's Net Metering Rule, 4 CSR 240-20.065, and the specific provisions of this rule include interconnection provisions for small scale customer-generators. At the time this rule was being developed, the IEEE and Underwriters Laboratory standards then in effect were incorporated into the rule. Since adoption of 4 CSR 240-20.065, a new IEEE standard has been developed. This new standard is IEEE 1547 "Interconnecting Distributed Resources with Electric Power Systems."

The change in IEEE standards renders the prior state action exemption partially inapplicable to the interconnection provisions of this rule. In order to adopt the latest applicable IEEE interconnection standard, it will be necessary to either revise 4 CSR 240-20.065, or require all of the regulated electric utilities to revise their tariffs to specifically identify compliance with IEEE 1547 as a criterion for approval of customer interconnection of a distributed generation source. Compliance tariffs reviewed, authorized and implemented by action of the Commission would be the most expedient way to implement the new IEEE 1547 standard. The Commission also concludes that the other electrical standards in the Clean

³⁰ A.C. Jacobs and Company v. Union Electric Company, 17 S.W.3d 579, 581 (Mo. App. 2000); State ex rel. St. Louis County Gas Co. v. Public Service Commission of Missouri, 286 S.W. 84, 86, (Mo. 1926); *Wheelock v. Walsh Fire Clay Products Co.*, 60 F.2d 415 (8th Circuit 1932); *Updike Grain Co. v. Chicago & N.W. Ry. Co.*, 35 F.2d 486 (8th Circuit 1929); *Chicago, R. I. & P. R. Co. v. Furniture Forwarders of St. . . .*, 267 F.Supp. 175 (D.C. Mo. 1967).

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Energy Act, and the 100 kW systems restrictions encompassed in the Commission's current Net Metering Rule, do not conflict with the new IEEE 1547 Standard.

Decision

The Commission in making this decision has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision. After applying the facts, as it has found them, to its conclusions of law, the Commission has reached the following decision.

The Commission will close Case Numbers EO-2006-0493 and EO-2006-0496, finding that the prior state action exemption applies and that no further action is required by the Commission with relation to those two matters. The Commission will order all regulated electric utilities to revise their tariffs to specifically identify compliance with the IEEE 1547 standard as a criterion for approval of customer interconnection of a distributed generation source. These tariffs shall be filed in Case No. EO-2006-0497 and once it is determined that the tariffs are in compliance with this order, EO-2006-0497 shall be closed, finding that the Commission has exercised its discretionary authority to fully adopt the standard pursuant to PURPA Sections 111(a)-(c).

IT IS ORDERED THAT:

1. Case Number EO-2006-0493, In the Matter of the Consideration of Adoption of the PURPA Section 111(d)(11) Net Metering Standard as Required by Section 1251 of the Energy Policy Act of 2005, is closed.
2. Case Number EO-2006-0496, In the Matter of the Consideration of Adoption of the PURPA Section 111(d)(14) Time-Based Metering and Communications Standard as Required by Section 1252 of the Energy Policy Act of 2005, is closed.

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3. No later than August 1, 2007, all Missouri Public Service Commission regulated electric utilities shall file with the Commission revised tariffs to specifically identify compliance with IEEE 1547 as a criterion for approval of customer interconnection of a distributed generation source. These tariffs shall be filed in Case Number EO-2006-0497, In the Matter of the Consideration of Adoption of the PURPA Section 111(d)(15) Interconnection Standard as Required by Section 1254 of the Energy Policy Act of 2005. Once it is determined that the tariffs are in compliance with this order Case Number EO-2006-0497 shall be closed.

4. This order shall become effective on July 22, 2007.

Davis, Chm., Murray and Appling, CC., concur;
Gaw and Clayton, CC., dissent;
and certify compliance with the provisions
of Section 536.080, RSMo 2000.

In the Matter of Laclede Gas Company's Tariff to Revise Natural Gas Rate Schedules

*Case No. GR-2007-0208, et al.
Decided July 19, 2007*

Gas §18. The Commission ordered that the proposed gas tariff sheets submitted on December 1, 2006, by Laclede Gas Company for the purpose of increasing rates for gas service to retail customers be rejected.

**ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT
AND AUTHORIZING TARIFF FILING**

Syllabus: This order approves the Unanimous Stipulation and Agreement, rejects the initial tariff filing, and authorizes Laclede Gas Company to file tariffs in compliance with the agreement.

On December 1, 2006, Laclede Gas Company submitted to the Commission proposed tariff sheets (YG-2007-0384) intended to implement a general rate increase for gas service provided to retail customers in its Missouri service area. The proposed tariff sheets bore a requested effective date of January 1, 2007. The proposed tariff sheets were designed to produce an annual increase of approximately \$52.9 million in

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the Company's revenues including approximately \$9.8 million in revenues from an increase in its purchased gas adjustment (PGA) rates. On December 13, 2006, the Commission suspended the Company's proposed tariff sheets until November 1, 2007. Along with its proposed tariff sheets, Laclede submitted supporting Direct Testimony.

The Commission granted the unopposed applications to intervene of the Missouri Energy Group,¹ the USW Local 11-6, the Missouri School Boards Association, the Missouri Industrial Energy Consumers (MIEC),² and the Missouri Department of Natural Resources.

The Commission held six local public hearings in Laclede's service territory to receive public comment on the proposed tariffs.

On July 9, 2007, the parties filed a Unanimous Stipulation and Agreement. Attachment 1 to the agreement was amended on July 12, 2007, as were a number of the pages of the specimen tariff. In addition, on that date, the signature page for DNR was attached. No objections to the agreement were received. Staff filed a Memorandum in Support of the Unanimous Stipulation and Agreement on July 11, 2007. A copy of the Unanimous Stipulation and Agreement and its amendments are attached to this order as Attachments A and B.

On July 12, 2007, the Commission convened a hearing in its offices in Jefferson City in order to review the terms of the agreement with the parties. All parties except the USW Local 11-6 were represented at the hearing.

The signatory parties agreed that the Unanimous Stipulation and Agreement resolves all issues in this case. The parties further agreed that all of the prepared testimony and Staff's Affidavits could be received into the record. The Commission admits those exhibits as evidence.

The agreement provides that Laclede should be authorized to file revised tariff sheets containing new rate schedules for natural gas service. The new tariffs will be designed to increase Laclede's annual non-gas, Missouri jurisdictional revenues by \$38,600,000 including \$5,500,000 in Infrastructure System Replacement Surcharges (ISRS) that are already in effect. These revenue amounts are exclusive of any applicable license, occupation, franchise, gross receipts taxes or other similar tax or taxes.

¹ The Missouri Energy Group is comprised of: Barnes-Jewish Hospital and SSM HealthCare.

² The Missouri Industrial Energy Consumers are: Anheuser-Busch Companies, Inc., The Boeing Company, DaimlerChrysler, Ford Motor Company, General Motors Corporation, Hussmann Refrigeration, J.W. Aluminum, Monsanto Company, Pfizer, Precoat Metals, Procter & Gamble Manufacturing Company, Nestlé Purina, Solutia, and Tyco Healthcare.

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The parties further agreed that such revenue requirement shall be allocated to the Company's various customer classes in accordance and consistent with the customer billing determinants set forth in the amended Attachment 1 to the Unanimous Stipulation and Agreement. The parties also agreed to reduce the therm levels in the first block of Laclede's General Service distribution and PGA rates as set out in the attachment and that the rate differential between the first and second block of Laclede's General Service PGA would be reduced by 35%. The parties further agreed to certain credits and adjustments to be made through Laclede's PGA/Actual Cost Adjustment (ACA) mechanism.

The parties agreed that the rates set out in the sample tariff sheets attached to the agreement, as amended, are just and reasonable. The Unanimous Stipulation and Agreement contains numerous other provisions to resolve disputed issues between the parties, including a provision whereby the parties agree that Laclede's proposed tariffs should go into effect on August 1, 2007, or as soon thereafter as practical. Other issues resolved include: 1) tariff modifications for service initiation fees, reconnection charges, and credit scoring for deposits; 2) pensions and other post-employment benefits; 3) depreciation; 4) accounting authorizations and reservation of rights; 5) off-system sales and capacity release revenues; 6) gas supply incentive plan (GSIP); 7) low-income energy assistance program; 8) fixed gas price option; 9) ISRS; 10) cost allocation manual and affiliate transactions; and 11) the elimination of separate rate schedules for the former Fidelity Natural Gas Company customers.

The Commission has the legal authority to accept a Unanimous Stipulation and Agreement as offered by the parties as a resolution of issues raised in this case.³ In reviewing the agreement, the Commission notes:⁴

Every decision and order in a contested case shall be in writing, and, except in default cases, or cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law. * * *

³Section 536.060, RSMo Cum. Supp. 2006.

⁴Section 536.090, RSMo Cum. Supp. 2006. This provision applies to the Public Service Commission. *State ex rel. Midwest Gas Users' Association v. Public Service Commission of the State of Missouri*, 976 S.W.2d 485, 496 (Mo. App., W.D. 1998).

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Consequently, the Commission need not make either findings of fact or conclusions of law in this order.

The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence.⁵ Since no one has requested a hearing in this case, the Commission may grant the relief requested based on the agreement.

DISCUSSION:

This case illustrates one of the most important public policy questions faced by this Commission: What is the proper balance between keeping rates affordable in order to protect the health and welfare of consumers, especially those with fixed or low incomes, and ensuring that utilities have the necessary cash flow to operate their business, maintain their infrastructure, and have an **opportunity** to earn a fair return on investment, which is necessary to encourage development and maintenance of infrastructure?⁶ Both of these objectives are statutory duties of this Commission.

In this case, the record reflects that Laclede has not received an increase in rates for operational costs since 2005 and that Laclede, in January, requested almost \$53 million in increased rates. Furthermore, the record shows that Laclede has experienced increases in net utility investments since the last rate increase in 2005. In addition, Laclede has experienced approximately a 3% increase, roughly equal to the cost of inflation, in operating expenses.

The record further reflects that the proposed settlement in this case would reduce Laclede's original request substantially. The new revenues contemplated by the settlement would result in the average residential bill increasing approximately 2.65% or \$2.45 per month. The Commission recognizes that this is not a trivial amount of money to customers like those who testified at the public hearings. The increased cost of all utilities along with the rise in recent years of natural gas prices, gasoline prices, and healthcare costs have had an effect on those customers' ability to keep current on their bills.

Based on the agreement of the parties, the testimony received at the local public hearings, the prefiled testimony of the parties, and the arguments and testimony presented at the stipulation hearing, the

⁵ State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission, 776 S.W.2d 494, 496 (Mo. App. 1989).

⁶ See generally, Section 386.610, RSMo 2000.

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Commission finds that the parties have reached a just and reasonable settlement in this case. Rate increases are necessary from time to time to ensure utilities have the cash flow to maintain safe and adequate service. In addition, the low-income energy assistance and energy efficiency program provisions of this agreement greatly enhance Laclede's current programs, which the Commission believes is also in the public interest. Accordingly, the revisions set out in the specimen tariff sheets attached to the Unanimous Stipulation and Agreement, as amended, are just and reasonable. The Commission shall authorize Laclede to file tariffs in compliance with the Unanimous Stipulation and Agreement. The parties shall comply with the terms of the agreement, including the data and reporting requirements and the collaborative processes set out therein.

The tariffs to be filed shall be marked with an effective date which is at least 30 days past the issue date. However, because one provision of the agreement was that rates would be implemented by August 1, 2007, the Commission determines that good cause exists to approve tariffs that comply with the agreement on less than 30-days notice to become effective August 1, 2007.

IT IS ORDERED THAT:

1. The Unanimous Stipulation and Agreement filed on July 9, 2007, and amended on July 12, 2007, is hereby approved as a resolution of all issues in this case (See Attachments A and B).
2. Laclede Gas Company is ordered to comply with the terms of the Unanimous Stipulation and Agreement including the reporting requirements and collaborative processes set out therein.
3. The proposed gas service tariff sheets (YG-2007-0384) submitted on December 1, 2006, by Laclede Gas Company for the purpose of increasing rates for gas service to retail customers are hereby rejected.
4. Laclede Gas Company is authorized to file tariffs in compliance with the terms of the Unanimous Stipulation and Agreement.
5. Tariffs filed in accordance with Ordered Paragraph #4 shall be filed with an effective date which is at least 30 days after its issue date; however, if such tariffs are in compliance with the Unanimous Stipulation and Agreement, the Commission will approve those tariffs, effective August 1, 2007, or as soon thereafter as practical without the need for a further motion for expedited treatment.
6. The hearing set for July 30, 2007, to August 10, 2007, is canceled.

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7. This order shall become effective on July 29, 2007.

Davis, Chm., Murray, Clayton,
and Appling, CC., concur.
Gaw, C., dissents; separate
dissenting opinion may follow.

Dippell, Deputy Chief Regulatory Law Judge

NOTE: The Stipulation and Agreement referenced in the Order has not been published. If needed, the attachment is available in the official case files of the Public Service Commission.

NOTE: At the time of publication, no dissenting opinions have been issued.

**In the Matter of the Petition of VCI Company for Designation as an
Eligible Telecommunications Carrier**

Case No. CO-2006-0464

Decided July 24, 2007

Telecommunications §1. The Commission denied VCI Company the designation as an eligible telecommunications carrier to receive federal universal service fund support for all of the exchanges serviced by Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri. The Commission stated three reasons for denying the designation: (1) VCI's local usage plan was not comparable to the ILEC's plan; (2) VCI did not demonstrate an adequate commitment to provide the USF supported services to customers in Missouri; and, (3) granting VCI ETC designation was not demonstrated to be in the public interest.

APPEARANCES

Roger W. Steiner, Attorney at Law, Sonnenschein, Nath & Rosenthal, L.L.P., 4520 Main Street, Suite 1100, Kansas City, Missouri 64111, for VCI Company.

Robert J. Gryzmala, Attorney at Law, Southwestern Bell Telephone, L/P/ d/b/a AT&T Missouri, One SBC Center, Suite 3520, St. Louis, Missouri 63101

David Meyer, Senior Counsel, General Counsel, P.O. Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

Michael F. Dandino, Deputy Public Counsel, Office of the Public Counsel, Governor Office Building, Post Office Box 2230, Jefferson City, Missouri 65102, for Office of the Public Counsel and the public.

REGULATORY LAW JUDGE: Harold Stearley**REPORT AND ORDER****Procedural History**

On June 8, 2006, VCI Company ("VCI") filed a petition seeking designation as an Eligible Telecommunications Carrier ("ETC"). VCI requested this designation pursuant to Sections 214(e)(2) and (e)(6) of the Communications Act of 1934, as amended, Sections 54.101 through 54.207 of the Federal Communications Commission ("FCC") Rules, and Missouri Public Service Commission Rule 4 CSR 240-3.570. VCI requested designation as an ETC in all of the exchanges served by Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri ("AT&T Missouri").

On June 13, 2006, AT&T Missouri submitted its Application to Intervene pursuant to 4 CSR 240-2.075. AT&T Missouri's request was granted on June 26, 2006. An evidentiary hearing was conducted on April 18, 2007.

The singular issue before this Commission, as formulated by VCI, AT&T Missouri, the Office of Public Council ("OPC") and the Staff of the Missouri Public Service Commission ("Staff"), and as adopted by the Commission, is whether VCI has demonstrated that it meets all applicable state and federal requirements for designation as an ETC. However, as the record of this case demonstrates five specific contested issues emerged regarding whether VCI should be granted ETC designation. Those issues are;

- (1) Can the requirements for ETC designation be bifurcated, without seeking forbearance from the FCC, so the company would only have to qualify for receipt of low-income Universal Support Funds (USF) and not qualify for the receipt of high cost support funds?
- (2) Does VCI provide a local usage plan that is comparable to the ILEC, AT&T Missouri?
- (3) Does VCI satisfy the "own facilities" requirement for the provision of the designated supported services?

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(4) Should the Commission grant waivers of Commission Rules 4 CSR 240-3-570(2)(C) and 4 CSR 240-3.570(3)(C)(3), the “build out” requirements, to provide the supported services to customers making a reasonable request for service.

(5) Is it in the public interest to grant VCI ETC designation?

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. When making findings of fact based upon witness testimony, the Commission will assign the appropriate weight to the testimony of each witness based upon their qualifications, expertise and credibility with regard to the attested to subject matter.

The Parties

1. VCI is a privately held corporation organized under the laws of the State of Washington and is authorized to conduct business as a foreign corporation in the State of Missouri.¹

2. VCI’s principal office is located at 2228 South 78th Street, Tacoma, Washington 98409-9050.²

3. VCI’s stated focus is providing basic local exchange service to low-income consumers qualifying for Lifeline and Link-Up services.³

4. AT&T Missouri is a limited partnership duly authorized to conduct business in the State of Missouri.⁴

5. AT&T Missouri’s principal Missouri office is located at One AT&T Center, 35th Floor, St. Louis, Missouri 63101.⁵

¹ Hearing Exhibit 1, Prefiled Testimony of Stanley Johnson, p. 1 lines 26-27. See also Petition for Designation as an Eligible Telecommunications Carrier in the State of Missouri (“Petition”), p. 1, Section I, paragraph 1, filed June 8, 2006.

² Hearing Exhibit 1, p. 1, lines 4-5. See also Petition, p. 1, Section I, paragraph 1, filed June 8, 2006.

³ Hearing Exhibit 1, p. 2, lines 1-3; Transcript p. 46, lines 7-14

⁴ AT&T Missouri’s Application to Intervene, p. 1, Paragraph 1. See also Report and Order *In the Matter of Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri’s Revision to its General Exchange Tariff*, PSC Mo. No. 35 Regarding Provision of 811 Service, Case No. IT-2007-0187, issued February 1, 2007. Note: All statutory references are to RSMo 2000 unless otherwise noted.

⁵ *Id.*

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6. AT&T Missouri is a "local exchange telecommunications company" and a "public utility," and is duly authorized to provide "telecommunications service" within the State of Missouri as each of those phrases is defined in Section 386.020, RSMo 2000.⁶

7. The Office of the Public Counsel "may represent and protect the interests of the public in any proceeding before or appeal from the public service commission."⁷ Public Counsel "shall have discretion to represent or refrain from representing the public in any proceeding."⁸

8. The General Counsel of the Missouri Public Service Commission "represent[s] and appear[s] for the commission in all actions and proceedings involving any question under this or any other law, or under or in reference to any act, order, decision or proceeding of the commission . . ."⁹

Findings of Fact Regarding ETC Designation Requirements

9. Designation as an ETC is governed by the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"), Title 47 of the United States Code ("U.S.C."), Title 47 of the Code of Federal Regulations ("C.F.R."), the Federal Communication Commission's ("FCC") Report and Order *In the Matter of Federal-State Board on Universal Service*, CC Docket No. 96-45, FCC 05-46, 20 FCC Rcd. 6371, 2005 WL

⁶ *Id.*

⁷ Section 386.710(2), RSMo 2000; Commission Rules 4 CSR 240-2.010(16) and 4 CSR 240-2.040(2).

⁸ Section 386.710(3), RSMo 2000; Commission Rules 4 CSR 240-2.010(16) and 4 CSR 240-2.040(2). Public Counsel "shall consider in exercising his discretion the importance and the extent of the public interest involved and whether that interest would be adequately represented without the action of his office. If the public counsel determines that there are conflicting public interests involved in a particular matter, he may choose to represent one such interest based upon the considerations of this section, to represent no interest in that matter, or to represent one interest and certify to the director of the department of economic development that there is a significant public interest which he cannot represent without creating a conflict of interest and which will not be protected by any party to the proceeding." *Id.*

⁹ Section 386.071, RSMo 2000; Commission Rules 4 CSR 240-2.010(8) and 4 CSR 240-2.040(1). Additionally, the General Counsel "if directed to do so by the commission, to intervene, if possible, in any action or proceeding in which any such question is involved; to commence and prosecute in the name of the state all actions and proceedings, authorized by law and directed or authorized by the commission, and to expedite in every way possible, to final determination all such actions and proceedings; to advise the commission and each commissioner, when so requested, in regard to all matters in connection with the powers and duties of the commission and the members thereof, and generally to perform all duties and services as attorney and counsel to the commission which the commission may reasonably require of him." *Id.*

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646635 (FCC), (March 17, 2005) (herein after the "March 17, 2005 Order"), and Missouri Public Service Commission Rule 4 CSR 240-3.570.¹⁰

10. Section 214(e)(2) of the Act provides:

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.¹¹

11. Section 214(e)(1) of the Act provides:

A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 of this title and shall, throughout the service area for which the designation is received—

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title, either using its own facilities or a combination of its own facilities and resale of another

¹⁰ See *In re Missouri RSA No. 5 Partnership*, Case No. TO-2006-0172 (2006 WL 2726730 *2); *In re Northwest Missouri Cellular Ltd. Partnership*, Case No. TO-2005-0466 (2006 WL 2726731*2). The Commission recognizes that the recitation of the statutes and regulations concerning ETC designations are also conclusions of law, and will adopt these findings as conclusions in the conclusions of law section of this order.

¹¹ 47 U.S.C. Section 214(e)(2).

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carrier's services (including the services offered by another eligible telecommunications carrier);¹² and

(B) advertise the availability of such services and the charges therefor using media of general distribution.¹³

12. The term "facilities" is defined under the Act as being "any physical components of the telecommunications network that are used in the transmission or routing of the services that are designated for support pursuant to subpart B of this part."¹⁴ The term "own facilities" includes, but is not limited to, facilities obtained as unbundled network elements . . . provided that such facilities meet the definition of the term facilities under this subpart."¹⁵

13. The FCC has further interpreted the "facilities" requirement of Section 214(e)(1)(A) of the Act and concluded that "the statute does not require a carrier to use its own facilities (which can include Unbundled Network Elements ("UNEs")) to provide each of the designated services but, instead, permits a carrier to use its own facilities to provide at least one of the supported services."¹⁶

14. A common carrier may not receive USF support for services provided to an end user when those services are **solely** provided over facilities obtained through an interconnection agreement with a discount off the underlying carrier's tariffed rate, i.e. resale or reselling. Consequently, for purposes of universal service, UNEs and UNE-P are considered facilities owned by the carrier leasing the UNEs and resale services are considered facilities owned by the underlying carrier.¹⁷

¹² See also Hearing Exhibit 3, Prefiled Rebuttal Testimony of Walt Cecil, p. 4, lines 18-21; *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, FCC 05-46, 20 FCC Rcd. 6371, 2005 WL 646635 (FCC) ¶¶ 7-8 (March 17, 2005) (herein after the "March 17, 2005 Order"); *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, FCC 97-157, 12 FCC Rcd 8776, 1997 WL 236383 (FCC) ¶¶ 24, 150-152, (emphasis on ¶¶ 154 and 169) (Adopted May 7, 1997; Released May 8, 1997) (herein after the "May 8, 1997 Order").

¹³ Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act") Sections 214(e)(1) and 254(c). See also 47 U.S.C. Sections 214(e)(1) and 254(c).

¹⁴ 47 C.F.R. Sec. 54.201(e).

¹⁵ 47 C.F.R. Sec. 54.201(f).

¹⁶ FCC's May 8, 1997, ¶¶ 24, 150-169, (emphasis on ¶¶ 154 and 169).

¹⁷ Hearing Exhibit 3, p. 4, lines 18-22, p. 5, lines 1-8. See also the FCC's May 8, 1997 Order, ¶¶ 24, 150-169. Thus, VCI, if designated an ETC, could receive federal support for services provided over its own facilities including UNEs, but not for services provided by solely reselling

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15. The services that are supported by federal universal support mechanisms under Section 254(c) of the Act are enumerated in the Code of Federal Regulations and Commission's Rules.¹⁸ These services are:

a) Voice Grade Access to the Public Switched Network. The FCC has concluded that voice-grade access means the ability to make and receive phone calls, within a bandwidth of approximately the 300 to 3000 Hertz frequency range.¹⁹ There is no requirement to support high-speed data transmissions.²⁰

b) Local Usage. "Local usage means the amount of minutes of use of exchange service, prescribed by the Commission, provided free of charge to end users."²¹ Although the FCC requires an ETC applicant to demonstrate that it offers a local usage plan comparable to the one offered by the ILEC in the service areas for which the applicant seeks designation, the FCC has not adopted a specific local usage threshold.²²

c) Dual Tone Multi-Frequency Signaling or its Functional Equivalent. "DTMF is a method of signaling that facilitates the transportation of

another carrier's underlying service. Hearing Exhibit 3, p. 5, lines 1-17. If VCI cannot directly receive federal USF support for resale services, then it is not obligated to provide Lifeline eligible subscribers receiving service by resale the low income discounts. *Id.* However, AT&T Missouri indicates that it typically receives Lifeline support on behalf of the reselling CLECs customers and passes that discount through to the reseller via the interconnection agreement – this could allow the discounts to be passed through by VCI to its customers. *Id.*

¹⁸ 47 C.F.R. Sec. 54.101(a)(1)-(9); 47 C.F.R. Sec. 54.101(b); 4 CSR 240-3.570(3)(C)(1).

¹⁹ 47 C.F.R. Sec. 54.101(a)(1).

²⁰ See *In the Matter of Federal-State Joint board on Universal Service*, Report and Order, CC Docket Nos. 96-45, Report and Order in 96-262, 94-1, 91-213, 95-72, FCC 97-420, 13 FCC Rcd. 5318, 1997 WL 797532 (FCC) ¶¶ 15-16 (Adopted, December 30, 1997) (herein after the "December 30, 1997 Order").

²¹ 47 C.F.R. Sec. 54.101(a)(2). See also Commission Rule 4 CSR 240-3.570(2)(A)(4)(10).

²² The FCC's March 17, 2005 Order, ¶¶ 32-34. The March 17, 2005 Order arose out of the FCC's request to the Joint Board to "review certain of the Commission's rules relating to the high-cost universal service support mechanisms to ensure that the dual goals of preserving universal service and fostering competition continue to be fulfilled." *Id.* at ¶ 9.

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signaling through the network shortening call set-up time."²³

d) Single-Party Service or its Functional Equivalent. "Single-party service is telecommunications service that permits users to have exclusive use of a wireline subscriber loop or access line for each call placed, or, in the case of wireless telecommunications carriers, which use spectrum shared among users to provide service, a dedicated message path for the length of a user's particular transmission."²⁴

e) Access to Emergency Services. "Access to emergency services includes access to services, such as 911 and enhanced 911, provided by local governments or other public safety organizations. 911 is defined as a service that permits a telecommunications user, by dialing the three digit code "911," to call emergency services through a Public Service Access Point (PSAP) operated by the local government. Enhanced 911 is defined as 911 service that includes the ability to provide automatic numbering information (ANI), which enables the PSAP to call back if the call is disconnected, and automatic location information (ALI), which permits emergency service providers to identify the geographic location of the calling party. Access to emergency services includes access to 911 and enhanced 911 services to the extent the local government in an eligible carrier's service area has implemented 911 or enhanced 911 systems."²⁵

f) Access to Operator Service. "Access to operator services is defined as access to any automatic or

²³ 47 C.F.R. Sec. 54.101(a)(3). See also Commission Rule 4 CSR 240-3.570(3)(C)(1)(A).

²⁴ 47 C.F.R. Sec. 54.101(a)(4). See also Commission Rule 4 CSR 240-3.570(3)(C)(1)(B).

²⁵ 47 C.F.R. Sec. 54.101(a)(5). See also Commission Rules 4 CSR 240-3.570(3)(C)(1)(C) and (D).

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live assistance to a consumer to arrange for billing or completion, or both, of a telephone call."²⁶

g) Access to Interexchange Service. "Access to interexchange service is defined as the use of the loop, as well as that portion of the switch that is paid for by the end user, or the functional equivalent of these network elements in the case of a wireless carrier, necessary to access an interexchange carrier's network."²⁷

h) Access to Directory Assistance. "Access to directory assistance is defined as access to a service that includes, but is not limited to, making available to customers, upon request, information contained in directory listings."²⁸

i) Toll Limitation for Qualifying Low-Income Consumers. Toll limitation service is defined as either "toll blocking" (a service allowing customers to not allow the completion of outgoing toll calls from their telecommunications channel) or "toll control" (a service allowing customers to specify a certain amount of toll usage that may be incurred on their telecommunications channel per month of billing cycle).²⁹

16. In addition to the basic requirements for ETC designation outlined under Section 214(e)(1) of the Act, additional requirements for ETC designation were adopted by the FCC in the March 17, 2005 Order.³⁰ Similar requirements were adopted by the Commission in 4 CSR 240-3.570.

²⁶ 47 C.F.R. Sec. 54.101(a)(6). See also Commission Rule 4 CSR 240-3.570(3)(C)(1)(H).

²⁷ 47 C.F.R. Sec. 54.101(a)(7). See also Commission Rule 4 CSR 240-3.570(3)(C)(1)(E).

²⁸ 47 C.F.R. Sec. 54.101(a)(8). See also Commission Rule 4 CSR 240-3.570(3)(C)(1)(G).

²⁹ 47 C.F.R. Sec. 54.101(a)(9); 47 C.F.R. Sec. 54.400(b), (c), and (d). See also Commission Rule 4 CSR 240-3.570(3)(C)(1)(I).

³⁰ The FCC's March 17, 2005 Order, ¶¶ 20-39. Note: these requirements are mandatory for FCC designated ETC's and are codified at 47 C.F.R. 54.202(a)(1)-(5) for any common carrier that is not subject to state commission jurisdiction as delineated in Section 214(e)(6) of the Act. These requirements remain discretionary for state commissions (See the March 17, 2005 Order ¶ 20); however, this Commission adopted similar requirements in 4 CSR 240-3.570.

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These requirements provide that a carrier requesting designation as an ETC must:

(A) Commit to provide service throughout its proposed designated service area to all customers making a reasonable request for service. (FCC's March 17, 2005 Order ¶ 21; 47 C.F.R. 54.202(a)(1)(i)(A), 4 CSR 240-3.570(3)(C)(3)(A));

(B) Provide service on a timely basis to requesting customers within the applicant's service area where the applicant's network already passes the potential customer's premises. (FCC's March 17, 2005 Order ¶ 21; 47 C.F.R. 54.202(a)(1)(i)(A), 4 CSR 210-3.570(3)(C)(3)(A));

(C) Provide service within a reasonable period of time, if the potential customer is within the applicant's licensed service area but outside its existing network coverage, if service can be provided at reasonable cost by:

(1) Modifying or replacing the requesting customer's equipment;

2) Deploying a roof-mounted antenna or other equipment;

3) Adjusting the nearest cell tower;

(4) Adjusting network or customer facilities;

(5) Reselling services from another carrier's facilities to provide service; or

(6) Employing, leasing or constructing an additional cell site, cell extender, repeater, or other similar equipment. (FCC's March 17, 2005 Order ¶ 22; 47 C.F.R. 54.202(a)(1)(i)(B); 4 CSR 240-3.510(3)(C)(3)(B)).

(D) Submit a five-year plan that describes with specificity proposed improvements or upgrades to the applicant's network on a wire center-by-wire center basis throughout its proposed designated service area. Each applicant shall demonstrate how signal quality,

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coverage or capacity will improve due to the receipt of high-cost support; the projected start date and completion date for each improvement and the estimated amount of investment for each project that is funded by high-cost support; the specific geographic areas where the improvements will be made; and the estimated population that will be served as a result of the improvements. If an applicant believes that service improvements in a particular wire center are not needed, it must explain its basis for this determination and demonstrate how funding will otherwise be used to further the provision of supported services in that area. (FCC's March 17, 2005 Order ¶¶ 23-24; 47 C.F.R. 54.202(a)(1)(ii); 4 CSR 240-3.570(2)(A)(2)). **Note: Missouri's regulations provide for a two-year plan as opposed to the FCC's five-year plan.**

(E) Demonstrate its ability to remain functional in emergency situations, including a demonstration that it has a reasonable amount of back-up power to ensure functionality without an external power source, is able to reroute traffic around damaged facilities, and is capable of managing traffic spikes resulting from emergency situations. (FCC's March 17, 2005 Order ¶¶ 25-27; 47 C.F.R. 54.202(a)(2); 4 CSR 240-3.570(2)(A)(4));

(F) Demonstrate that it will satisfy applicable consumer protection and service quality standards. A commitment by wireless applicants to comply with the Cellular Telecommunications and Internet Association's Consumer Code for Wireless Service will satisfy this requirement. Other commitments will be considered on a case-by-case basis. (FCC's March 17, 2005 Order ¶¶ 28-31; 47 C.F.R. 54.202(a)(3); 4 CSR 240-3.570(2)(A)(8));

(G) Demonstrate that it offers a local usage plan comparable to the one offered by the incumbent LEC in the service areas for which it seeks designation. (FCC's March 17, 2005 Order ¶¶ 32-34; 47 C.F.R. 54.202(a)(4). 4 CSR 240-3.570(2)(A)(10)); and

H) Certify that the carrier acknowledges that the Commission may require it to provide equal access to long distance carriers in the event that no other eligible telecommunications carrier is providing equal access within the service area. (FCC's March 17, 2005 Order ¶¶ 35-36; 47 C.F.R. 54.202(a)(5), 4 CSR 240-3.570(2)(A)(9)).

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Findings of Fact Related to VCI's Application for ETC Designation

17. VCI is authorized to provide local exchange service in California, Colorado, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nebraska, Missouri, New Mexico, North Dakota, Oregon, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming.³¹

18. On March 31, 2006, VCI was granted a certificate to provide basic local telecommunication as a Competitive Local Exchange Carrier ("CLEC") in Missouri by the Commission's order in Case No. CA-2006-0323. The order granting the certificate became effective April 10, 2006.³²

19. VCI's Missouri local exchange tariff was approved on July 7, 2006, taking effect on July 9, 2006.³³

20. VCI entered into an interconnection agreement with AT&T Missouri that was filed with the Commission on May 24, 2006 in Case No. CK-2006-0446, and which was approved by Commission order, effective July 21, 2006. The Interconnection Agreement covers resale services and UNEs.³⁴

21. VCI is not yet providing local exchange or exchange access services in Missouri; however, it expects to provide service in Missouri in AT&T Missouri exchanges using a combination of UNEs, consisting of the local loop, ports and transport, provided by AT&T and resale of AT&T's services.³⁵

³¹ Hearing Exhibit 1, p. 2, lines 3-7.

³² Hearing Exhibit 1, p. 2, lines 9-10; In the Matter of the Application of VCI Company for a Certificate of Service Authority to Provide Basic Local Exchange and Exchange Access Service Throughout the State of Missouri and to Classify the Company as Competitive, Case No. CA-2006-0323; Transcript p. 49, lines 15-18.

³³ Missouri P.S.C. Tariff No. 1, Tariff File Number YC-2006-0878.

³⁴ Hearing Exhibit 1, p. 2, lines 10-12; Transcript p. 49, lines 23-25, p. 50, lines 1-25, p. 51, lines 1-15, p. 124, line 25, p. 125, lines 1-14. See also *In the Matter of the Application of VCI Company for Approval of Its Interconnection Agreement with Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri*, Case No. CK-2006-0446; Petition, p. 3, paragraph 4, filed June 8, 2006.

³⁵ Hearing Exhibit 1, p. 7, lines 10-12, p. 8, lines 19-22, p. 9, lines 1-5; Transcript p. 49, lines 23-25, p. 50, lines 1-25, p. 51, lines 1-15, p. 125, lines 15-25, p. 126, lines 1-8. See also *In the Matter of the Application of VCI Company for Approval of Its Interconnection Agreement with Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri*, Case No. CK-2006-0446; Petition, p. 3, paragraph 5, filed June 8, 2006.

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22. VCI has been designated as an ETC in California, Colorado, Florida, Idaho, Iowa, Michigan, Minnesota, Mississippi, Nebraska, North Dakota, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.³⁶

23. At the time of VCI's application to be designated as an ETC in Missouri, it had applications for ETC designation pending in Georgia, Kansas, Louisiana, and Tennessee.³⁷

24. At the time of VCI's filing of rebuttal testimony, Kansas (Docket 06-VCOT-126-ETC), Louisiana (Docket S-29619), and Tennessee (Docket 06-00126) had approved VCI's applications and granted VCI ETC designation in those states.³⁸

25. VCI has not been denied ETC designation in any state in which it has applied.³⁹

26. VCI has discontinued providing service in the states of Washington and Oregon because the underlying carrier raised the rates it charges for UNEs by approximately twenty-five percent.⁴⁰

27. VCI's business plan for Missouri focuses on providing affordable local exchange services to underserved and unserved market segments, most of which VCI believes are comprised of low-income consumers, many of whom have been disconnected from other carriers.⁴¹

28. If designated as an ETC, VCI represents that it will provide Lifeline⁴² and Link-Up⁴³ services in the service area where AT&T Missouri is a certificated local exchange carrier.⁴⁴

³⁶ Hearing Exhibit 1, p. 2, lines 14-16; Transcript p. 44, lines 16-24.

³⁷ Hearing Exhibit 1, p. 2, lines 16-17; Transcript p. 43, lines 13-19, p. 44, lines 13-20, p. 94, lines 5-18, p. 155, lines 20-25, p. 156, lines 1-8.

³⁸ Hearing Exhibit 2, Prefiled Surrebuttal Testimony of Stanley Johnson, p. 11, lines 1-5. See also Footnote No. 37.

³⁹ Hearing Exhibit 1, p. 2, lines 21-23.

⁴⁰ Transcript p. 45, lines 2-18, p. 92, lines 4-25, p. 93, lines 1-22.

⁴¹ Hearing Exhibit 1, p. 3, lines 3-8, p. 119, lines 18-25, p. 120, lines 1-4. See also Footnote Number 3.

⁴² "Lifeline," as defined under the Act, "means a retail local service offering: (1) That is available only to qualifying low-income consumers; (2) For which qualifying low-income consumers pay reduced charges as a result of application of the Lifeline support amount described in Sec. 54.403; and (3) That includes the services or functionalities enumerated in Sec. 54.101 (a)(1) through (a)(9). The carriers shall offer toll limitation to all qualifying low-income consumers at the time such consumers subscribe to Lifeline service. If the consumer elects to receive toll limitation, that service shall become part of that consumer's Lifeline service." 47 C.F.R. Sec. 54.401(a). This section further provides: "b) [Reserved]. (c) Eligible telecommunications carriers may not collect a service deposit in order to initiate Lifeline service, if the qualifying low-income consumer voluntarily elects toll limitation service from the carrier, where available. If toll limitation services are unavailable, the carrier may charge a service deposit. (d) The state commission shall file or require the eligible telecommunications carrier to file information with

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29. VCI does not intend to seek or utilize federal high cost funding as an ETC, and will only seek reimbursement from the federal low income support mechanism.⁴⁵

30. VCI asserts that many of the requirements set forth for ETC designation in Commission Rule 4 CSR 240-3.570 apply only to wireless carriers or carriers requesting reimbursement from the federal high cost fund. Consequently, VCI believes that these specific provisions do not

the Administrator demonstrating that the carrier's Lifeline plan meets the criteria set forth in this subpart and stating the number of qualifying low-income consumers and the amount of state assistance. Eligible telecommunications carriers not subject to state commission jurisdiction also shall make such a filing with the Administrator. Lifeline assistance shall be made available to qualifying low-income consumers as soon as the Administrator certifies that the carrier's Lifeline plan satisfies the criteria set out in this subpart. (e) Consistent with Sec. 52.33(a)(1)(i)(C), eligible telecommunications carriers may not charge Lifeline customers a monthly number-portability charge."

⁴³ "Link-Up," as defined under the Act, "shall describe the following assistance program for qualifying low-income consumers, which an eligible telecommunications carrier shall offer as part of its obligation set forth in Sections 54.101(a)(9) and 54.101(b): (1) A reduction in the carrier's customary charge for commencing telecommunications service for a single telecommunications connection at a consumer's principal place of residence. The reduction shall be half of the customary charge or \$30.00, whichever is less; and (2) A deferred schedule for payment of the charges assessed for commencing service, for which the consumer does not pay interest. The interest charges not assessed to the consumer shall be for connection charges of up to \$200.00 that are deferred for a period not to exceed one year. Charges assessed for commencing service include any charges that the carrier customarily assesses to connect subscribers to the network. These charges do not include any permissible security deposit requirements. (3) For an eligible resident of Tribal lands, a reduction of up to \$70, in addition to the reduction in paragraph (a)(1) of this section, to cover 100 percent of the charges between \$60 and \$130 assessed for commencing telecommunications service at the principal place of residence of the eligible resident of Tribal lands. For purposes of this paragraph, charges assessed for commencing telecommunications services shall include any charges that the carrier customarily assesses to connect subscribers to the network, including facilities-based charges associated with the extension of lines or construction of facilities needed to initiate service. The reduction shall not apply to charges assessed for facilities or equipment that fall on the customer side of demarcation point, as defined in Sec. 68.3 of this chapter." 47 C.F.R. Sec. 54.411. This section further provides: "(b) A qualifying low-income consumer may choose one or both of the programs set forth in paragraphs (a)(1) and (a)(2) of this section. An eligible resident of Tribal lands may participate in paragraphs (a)(1), (a)(2), and (a)(3) of this section. (c) A carrier's Link Up program shall allow a consumer to receive the benefit of the Link Up program for a second or subsequent time only for a principal place of residence with an address different from the residence address at which the Link Up assistance was provided previously. (d) An eligible telecommunications carrier shall publicize the availability of Link Up support in a manner reasonably designed to reach those likely to qualify for the support."

⁴⁴ Hearing Exhibit 1, p. 3, lines 9-14. Transcript p. 33, lines 10-25, p. 34, lines 1-11, p. 108, lines 14-18.

⁴⁵ Hearing Exhibit 1, p. 4, lines 9-12. Transcript p. 152, lines 18-25, p. 153, lines 1-25, p. 154, lines 1-15.

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apply to its application, and that it should receive ETC designation without meeting those requirements.⁴⁶

31. Staff believes that the only sections of Commission Rule 4 CSR 240-3.570(2) and (3) that are applicable to VCI's application are:

- a. 4 CSR 240-3.570(2)(A)5, a demonstration that the commission's grant of the applicant's request for ETC designation is in the public interest;
- b. 4 CSR 240-3 .570 (2)(A)6, a commitment to advertise;
- c. 4 CSR 240-3 .570(2)(A)7, a commitment to provide Lifeline and Link-up discounts;
- d. 4 CSR 240-3 .570(2)(A)8, a statement that VCI will satisfy consumer privacy protection standards as provided in 47 CFR 64 Subpart U;
- e. 4 CSR 240-3 .570(2)(A)10, a commitment to offer a local usage plan comparable to that offered by the ILEC, and more specifically a commitment to provide Lifeline and Linkup rates comparable to the incumbent;
- f. 4 CSR 240-3 .570(3)(A), bill design;
- g. 4 CSR 240-3.570(3)(B), customer service contact information;
- h. 4 CSR 240-3 .570(3)(C) 1, service provisioning commitment
- i. 4 CSR 240-3.570(3)(E), records of customer complaints; and
- j. 4 CSR 240-3.570(3)(F), company contact information.⁴⁷

32. Staff believes that VCI is in compliance with all **applicable** Commission Regulations to be designated as an ETC and recommends the Commission grant VCI's application and that the designation only be for low income support.⁴⁸

33. AT&T Missouri's position is that VCI must seek forbearance from the FCC in order to pursue designation for only low income support.

⁴⁶ Hearing Exhibit 1, p. 7, lines 2-9. p. 14, line 27, p. 15, lines 1-5; Transcript p. 100, lines 21-25, p. 101, lines 1-25, p. 102, lines 1-4, p. 104, lines 7-19, p. 109, lines 6-22, p. 152, lines 18-25, p. 153, line 1.

⁴⁷ Hearing Exhibit 3, Prefiled Rebuttal Testimony of Walt Cecil, p. 5, lines 18-23, p. 6, lines 1-15; Transcript p. 145, lines 19-24, p. 152, lines 5-25, p. 153, lines 1-25, p. 154, lines 1-15.

⁴⁸ Hearing Exhibit 2, p. 1, lines 21-23; p. 2, lines 10-12; Hearing Exhibit 3, p. 6, lines 27-34, p. 7, lines 1-18. Transcript, p. Transcript p. 145, lines 19-24, p. 152, lines 5-25, pp. 153-160, p. 164, lines 9-25, pp. 165-166, p. 167, lines 1-11, p. 188, lines 5-24.

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AT&T's position is that ETC designation cannot be bifurcated into two categories, i.e. creating a category for only low income support vs. high cost support, without FCC approval. Consequently, AT&T asserts that VCI must meet all federal and state requirements to receive ETC designation.⁴⁹

34. The Commission's decision on the contested issue of whether VCI must seek forbearance from the FCC in order to pursue designation for only low income support is a conclusion of law that the Commission will address in a later part of this order.

Findings of Fact Regarding VCI's Compliance with all ETC Requirements

35. VCI is a common carrier as that term is defined in the Act, because it provides competitive local telecommunications services in several states.⁵⁰

36. VCI represents that it will offer all of the services that are supported by federal universal service support mechanisms under section 254(c) as required by Section 214(e)(1)(A) of the Act.⁵¹

37. VCI represents that it will offer all of the services supported by federal universal service support mechanisms by using a combination of its "own facilities" and resale of another carrier's services.⁵²

38. VCI represents that use of AT&T Missouri UNEs meets the definition of "facilities" under the Act.⁵³

39. VCI asserts that its combination of resale and UNEs to provide the supported services depends on the ILEC's pricing structure, and that it can satisfy the "facilities" requirement even if it procures all of the USF-supported services, except for one (Directory Assistance) by means of resale.⁵⁴

⁴⁹ Hearing Exhibit 5, Prefiled Surrebuttal Testimony of James, E. Stidham, Jr., p. 1, lines 23-33, p. 2, lines 5-33, p. 3, lines 1-21.

⁵⁰ Hearing Exhibit 1, p. 8, lines 13-17. "[T]he term 'common carrier' or carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy . . .". See 47 U.S.C. Sec. 153(10).

⁵¹ Hearing Exhibit 1, p. 10, lines 7-22, pp. 11-13, p. 14, lines 1-2, p. 18, lines 12-16; Hearing Exhibit 2, p. 2, lines 8-15.

⁵² Hearing Exhibit 1, p. 2, lines 26-27, p. 3, line 1, p. 5, lines 26-27, p. 6 lines 1-14, p. 7, lines 1-9, p. 8, lines 19-20, p. 10, lines 7-22, p. 11, lines 1-27, p. 12, lines 1-27, p. 13, lines 1-27, p. 14, lines 1-2; Transcript p. 118, lines 9-25, p. 119, lines 1-13, p. 127, lines 11-17.

⁵³ Hearing Exhibit 1, p. 8, lines 20-22, p. 9, line 1, p. 10, lines 8-22, p. 11, lines 1-6. See also FCC's May 8, 1997, ¶¶ 24, 150-169 and Transcript p. 54, lines 5-25, p. 55, lines 1-4, p. 118, lines 9-25, p. 119, lines 1-13.

⁵⁴ Transcript p. 54, lines 5-25, p. 55, lines 1-4, p. 118, lines 9-25, p. 119, lines 1-13.

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40. VCI will advertise the supported services in media of general distribution as required in Section 214(e)(1)(B) of the Act.⁵⁵

41. In states where VCI is currently providing service as a designated ETC, VCI advertises the availability of Lifeline and Link-Up service via television advertisements. VCI has developed brochures in English and Spanish which are displayed in government agency offices and offices of organizations that provide services to low-income consumers, such as state departments of social service, housing offices, and food banks. VCI advertises its services in newspapers and fliers in Native American communities and also works directly with some tribal coordinators. VCI's advertising plan is designed to provide notification of the existence of low-income programs to the largest number of Lifeline eligible consumers.⁵⁶

42. VCI is in compliance with the outreach guidelines adopted by the FCC in its Report and Order released April 29, 2004,⁵⁷ including: 1) utilizing outreach materials and methods designed to reach households that do not currently have telephone service; 2) developing outreach advertising that can be read or accessed by any sizeable non-English speaking populations within a carrier's service area; and 3) coordination of outreach efforts with governmental agencies/tribes that administer relevant government assistance programs.⁵⁸

43. In addition to complying with the basic federal requirements in Section 214(e) of the Act, VCI represents that it will comply with all additional applicable federal and all applicable Commission requirements to qualify for and maintain its ETC status.⁵⁹

44. Commission Rule 4 CSR 240-3.570(1) provides definitions of terms for the Commission's ETC designation requirements outlined in subsections (2) through (5).⁶⁰

45. VCI must comply with the Commission's requirements for ETC designation outlined in Commission Rules 4 CSR 240-3.570(2) through (5), unless otherwise waived by the Commission.⁶¹

⁵⁵ Hearing Exhibit 1, p. 9, lines 7-25, p. 10, lines 1-6; Hearing Exhibit 2, p. 2, lines 16-25, p. 3, lines 1-12.

⁵⁶ Hearing Exhibit 1, p. 9, lines 12-22.

⁵⁷ *In the Matter of Lifeline and Link-Up*, Report and Order, WC Docket No. 03-109, FCC 04-87, 19 FCC Rcd. 8302, 2004 WL 912459 (FCC) ¶¶ 41-49 (Released April 29, 2004) (herein after the "April 29, 2004 Order").

⁵⁸ Hearing Exhibit 1, p. 9, lines 24-25, p. 10, lines 1-6.

⁵⁹ Hearing Exhibit 1, p. 10, lines 7-22, pp. 11-13, p. 14, lines 1-2, p. 18, lines 12-16; Hearing Exhibit 2, p. 2, lines 8-15.

⁶⁰ Commission Rule 4 CSR 240-3.570(1).

Findings of Fact Regarding VCI's Compliance with 4 CSR 240-3.570(2)

46. Commission Rules 4 CSR 240-3.570(2)(A)(1), (2) and (3) all apply to carriers that intend to seek federal high cost support, and VCI maintains that it is not seeking reimbursement from any state or federal high cost fund, and; consequently, should not be required to comply with the requirements set forth in these rules.⁶²

47. Commission Rule 4 CSR 240-3570(2)(A)(4) requires the ETC applicant to demonstrate its ability to remain functional in emergency situations, including a demonstration that it has a reasonable amount of back-up power to ensure functionality without an external power source, is able to reroute traffic around damaged facilities, and is capable of managing traffic spikes resulting from emergency situations.⁶³

48. VCI's ability to remain functional in an emergency situation is totally dependent on that of AT&T Missouri, its underlying network based carrier, including the supply of a reasonable amount of back-up power to ensure functionality without an external power source, ability to reroute traffic around damaged facilities, and capability of managing traffic spikes resulting from emergency situations.⁶⁴

49. VCI cannot independently satisfy the requirements of Commission Rule 4 CSR 240-3570(2)(A)(4); however, the Commission's Staff asserts that this rule is inapplicable to VCI.⁶⁵

50. VCI represents that granting its request for ETC status is in the public interest, convenience and necessity, as required by 4 CSR 240-3.570(2)(A)(5) because designation of VCI as an ETC will:

- a. increase customer choice in carriers that offer Lifeline and Link-Up services;

⁶¹ To the extent that the Commission's Rules for ETC designation apply to commercial radio mobile service ("CMRS") providers or to rural access, those rules would not apply to VCI. Those rules include: 4 CSR 240-3.570(2)(A)(III)—rural access; 4 CSR 240-3.570(2)(B)—CMRS providers; 4 CSR 240-3.570(3)(A)—CMRS providers; 4 CSR 240-3.570(3)(D)—CMRS providers; 4 CSR 240-3.570(4)(C)(1)(C)—rural access; 4 CSR 240-3.570(5)(A)—CMRS providers. To the extent that VCI requests specific waivers of any of the Commission's rules, it must comply with Commission Rule 4 CSR 240-2.060(4) and must provide complete justification setting out good cause for granting the waiver.

⁶² Hearing Exhibit 1, p. 7, lines 2-9, p. 14, line 27, p. 15, lines 1-5. Transcript p. 152, lines 18-25, p. 153, lines 1-25, p. 154, lines 1-15.

⁶³ Commission Rule 4 CSR 240-3570(2)(A)(4).

⁶⁴ Hearing Exhibit 1, p. 15, lines 15-20.

⁶⁵ Hearing Exhibit 3, p. 5 lines 20-23, p. 6, lines 1-26.

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- b. ensure that the availability of Lifeline and Link-Up services is widely publicized;
- c. remove obstacles to telephone subscribership for low-income consumers;
- d. contribute to low-income consumers incurring significantly less toll charges;
- e. permit low-income consumers access to premium services;
- f. ensure that low-income consumers have a choice in carriers whose business procedures and processes specifically benefit the low-income consumer; and,
- g. have no affect on the financial status of the universal service fund because VCI cannot possibly increase Lifeline and Link-Up participation rates to 100% and because the Missouri USF reimburses all ETCs equally.⁶⁶

51. AT&T contends that granting VCI's application is not in the public interest because:

- a. there are numerous choices available to consumer in Missouri absent VCI's presence in the marketplace; thus, VCI does not offer "meaningful choice;"
- b. data from the Universal Service Administrative Company does not accurately reflect the total number of Lifeline eligible households because the methodology used can double count eligible households, thus the need for VCI's services is hinged upon a count of mythical underserved and unserved potential customers;⁶⁷

⁶⁶ Hearing Exhibit 1, pp. 19-23; Hearing Exhibit 2, p. 2, lines 14-15; p. 6, lines 16-24, p. 7, lines 1-24, p. 8, lines 1-24, p. 9, lines 1-21, p. 10, lines 1-7, p. 11, lines 6-22; Transcript p. 119, lines 14-25, p. 120, lines 1-25, p. 121, lines 1-9, p. 131, lines 2-25, pp. 132-137, p. 138, lines 1-17, p. 144, lines 11-25, p. 145, lines 1-18, p. 165 lines 13-25, p. 166, lines 1-25, p. 167, lines 1-11, p. 168, lines 23-25, p. 169, lines 1-9, p. 193, lines 7-25, p. 194, lines 1-25, p. 195, lines 1-22.

⁶⁷ Specifically, AT&T's witness, Mr. James E. Stidham, Jr. testified that: "The map of 2005 Lifeline Participation, prepared by the Universal Service Administrative Company, cannot be relied on to accurately capture the total number of Lifeline eligible households. The map overstates this number, and thus it underestimates the "take rate" (a percentage reached by dividing the number of actual participants by the number of all who are eligible). USAC's methodology for determining the number of eligible households is flawed. USAC estimated that 58% of households were receiving assistance through more than one program. Stated simply, if a household participated in more than one program, it was counted as an eligible household more than one time, thereby overcalculating the total number of eligible households, and thus causing a much lower take rate than were the households counted only once in the denominator. For example, the USAC map shows Texas as having a Lifeline take rate of only

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c. data from the FCC demonstrates that Missouri has a telephone penetration rate of 96.5%, compared to the national average of 94.6%; again, there is no need for VCI's services;

d. increasing the number of Lifeline subscribers would cause the size of the USF and customer surcharge to greatly increase and would increase costs for the rate payers;

e. VCI's service offerings are not unique because it offers the exact same services as AT&T Missouri;

f. designating VCI as an ETC will not lower toll charges billed by another provider; and,

g. offering service to customers that have defaulted with payments to other providers, while also committing not to pursue payments when a customer is in arrears with VCI, decreases social responsibility.⁶⁸

52. The Commission's decision on the contested issue of whether VCI satisfies the requirements of 4 CSR 240-3.570(2)(A)(5) is a conclusion of law that the Commission will address in a later part of this order.

53. VCI will advertise the supported services in media of general distribution as required by 4 CSR 240-3.570(2)(A)(6) and (7).⁶⁹

54. VCI's commitment to provide Lifeline and Link-Up services and discounts in the service area where AT&T Missouri is a certificated local exchange carrier satisfies the remaining requirements of 4 CSR 240-3.570(2)(A)(7) and 47 C.F.R. 54.401 and 47 C.F.R. 54.411.⁷⁰

55. VCI represents that it will comply with all applicable federal and state consumer protection, consumer privacy and service quality standards as required in 4 CSR 240-3.570(2)(A)(8) and 47 C.F.R. 64, Subpart U.⁷¹

56. As required by Commission Rule 4 CSR 240-3.570(2)(A)(9) VCI certifies that it acknowledges that the Commission may require it to provide equal access to long distance carriers pursuant to 4 CSR 240-

between 20% and 50% even though Texas has a Lifeline auto enrollment process." Hearing Exhibit 4, p. 12, lines 14-27, p. 13, lines 1-4.

⁶⁸ Hearing Exhibit 4, Prefiled Rebuttal Testimony of James E. Stidham, pp. 11-19; Transcript p. 119, lines 14-25, p. 120, lines 1-25, p. 121, lines 1-9, p. 131, lines 2-25, pp. 132-137, p. 138, lines 1-17, p. 144, lines 11-25, p. 145, lines 1-18, p. 165 lines 13-25, p. 166, lines 1-25, p. 167, lines 1-11, p. 168, lines 23-25, p. 169, lines 1-9, p. 193, lines 7-25, p. 194, lines 1-25, p. 195, lines 1-22.

⁶⁹ Hearing Exhibit 1, p. 9, lines 7-25, p. 10, lines 1-6; Hearing Exhibit 2, p. 2, lines 16-25, p. 3, lines 1-12; Transcripts p. 57, lines 24-25, p. 58, lines 1-11. This requirement overlaps with Section 214(e)(1)(B) of the Act. See also Findings of Fact Numbers 38, 39 and 40.

⁷⁰ Hearing Exhibit 1, p. 3, lines 9-14. Transcript p. 108, lines 14-18. See also FOFs Numbers 57, 59, 61, and 62.

⁷¹ Hearing Exhibit 1, p. 15, lines 21-25; Hearing Exhibit 2, p. 2, lines 16-25, p. 3, lines 1-12.

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32.100(3) and (4) in the event that all other eligible telecommunications carriers within the designated area relinquish their designations pursuant to section 214(e) of the Act.⁷²

57. As required by 4 CSR 240-3.570(2)(A)(10), VCI's local usage plan must be comparable to the ILEC's, AT&T Missouri's, plan. The rule specifically provides:

(2) Applications for Designation as an ETC.

(A) Each request for ETC designation shall include:

(10) **A commitment** to offer a local usage plan comparable to those offered by the incumbent local exchange carrier in the areas for which the carrier seeks designation. **Such commitment shall include** a commitment to provide Lifeline and Link Up discounts and Missouri Universal Service Fund (MoUSF) discounts pursuant to 4 CSR 240-31, if applicable, at rates, terms and conditions comparable to the Lifeline and Link Up offerings and MoUSF offerings of the incumbent local exchange carrier providing service in the ETC service area.

58. Regarding the comparison of local usage plans, the FCC stated:

We adopt the Joint Board's⁷³ recommendation that we establish a local usage requirement as a condition of receiving ETC designation. **Specifically, we require an ETC applicant to demonstrate that it offers a local usage plan comparable to the one offered by the incumbent LEC in the service areas for which the applicant seeks designation.** As in past orders, however, we decline to adopt a specific local usage threshold.

⁷² Hearing Exhibit 1, p. 18, lines 3-11.

⁷³ Federal-State Joint Board on Universal Service.

The Commission requires an ETC to provide local usage in order to receive universal service high-cost support. In the *First Report and Order*, the Commission determined that an ETC should provide some minimum amount of local usage as part of its "basic service" package of supported services, but declined to specify the exact amount of local usage required. **We believe the Commission should review an ETC applicant's local usage plans on a case-by-case basis.** For example, an ETC applicant may offer a local calling plan that has a different calling area than the local exchange area provided by the LECs in the same region, or the applicant may propose a local calling plan that offers a specified number of free minutes of service within the local service area. We also can envision circumstances in which an ETC is offering an unlimited calling plan that bundles local minutes with long distance minutes. The applicant may also plan to provide unlimited free calls to government, social service, health facilities, educational institutions, and emergency numbers. **Case-by-case consideration of these factors is necessary to ensure that each ETC provides a local usage component in its universal service offerings that is comparable to the plan offered by the incumbent LEC in the area.**

We encourage state commissions to consider whether an ETC offers a local usage plan comparable to those offered by the incumbent in examining whether the ETC applicant provides adequate local usage to receive designation as an ETC. In addition, although the Commission has not set a minimum local usage requirement, there is nothing in the Act, Commission's rules, or orders that would limit state commissions from prescribing some amount

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of local usage as a condition of ETC status.
(citations omitted).⁷⁴

59. In addition to requiring local usage plans be comparable to the ILEC's, Commission Rule 4 CSR 240-3.570(2)(A)(10) also requires the ETC applicant to commit to passing through all applicable state and federal service discounts to its end-user customers, thus reducing the price of access to telecommunications services for the Lifeline and Link-Up eligible customer.⁷⁵

60. VCI will offer flat rate, unlimited local service permitting the customer to make an unlimited amount of local calls within his/her local calling area.⁷⁶

61. VCI will pass through all applicable state and federal service discounts to its end-user customers, thus reducing the price of access to telecommunications services for its Lifeline and Link-Up eligible customer.⁷⁷

62. VCI will use federal low-income support funding exclusively to supplement its provision of low-cost basic local exchange telecommunications service to low-income residential subscribers who are eligible for support under the federal low-income support mechanism.⁷⁸

63. VCI will reduce the price of its services by passing through all applicable state and federal mandated service support for its Lifeline and Link-up customers as follows.⁷⁹

⁷⁴ FCC's March 17, 2005 Order, ¶¶ 32-34.

⁷⁵ Commission Rule 4 CSR 240-3.570(2)(A)(10).

⁷⁶ Hearing Exhibit 1, p. 11, lines 19-27; Hearing Exhibit 2, p. 2, lines 16-25, p. 3, lines 1-12.

⁷⁷ Hearing Exhibit 1, p. 4, lines 3-8, p. 15, lines 6-14. The FCC has determined that Lifeline providers utilize Federal universal service support for the purpose it was intended when the carrier reduces the price of access to telecommunications services for the eligible customer by the amount of that support. *In the Matter of Federal-State Board on Universal Service, Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. Sec. 214(e)(1)(A) and 47 C.F.R. Sec. 54.201(i)*, Report and Order, CC Docket No. 96-45, FCC 05-165, 20 FCC Rcd. 15095, 2005 WL 2171410 (FCC) ¶ 26 (Adopted September 6, 2005; Released September 8, 2005)(herein after the "September 8, 2005 Order"). James E. Stidham, Jr., testifying for AT&T Missouri, stated that he believed that VCI did not appear to be complying with the federal "pass-through" rules, however, Stanley Johnson, VCI's President, rebutted this testimony, demonstrating that Mr. Stidham had based this opinion on faulty calculations. Hearing Exhibit 4, p. 8, lines 6-17, p. 9, lines 1-19, p. 10, lines 1-9; Hearing Exhibit 2, p. 5, lines 19-24, p. 6, lines 1-15. See also Transcript p. 92, lines 19-25, p. 93, lines 1-10.

⁷⁸ Hearing Exhibit 1, p. 4, lines 3-8.

⁷⁹ Hearing Exhibit 1, p. 18, lines 18-28, p. 19, lines 1-13; Hearing Exhibit 2, p. 5, lines 19-24, p. 6, lines 1-15. Transcripts p. 28, lines 23-25, pp. 29-30, p. 31, lines 1-21. Transcript p. 84, lines 12-25, p. 85, lines 1-24.

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Tier I	- Subscriber Line Charge	\$5.67 ⁸⁰
Tier II	- Federal Discount	\$1.75
Tier III	- State Low-Income Discount	\$3.50
	- Additional Federal Discount	<u>\$1.75</u>
Sub-total		\$12.67
Company Discount		<u>\$3.99</u>
Total Federal, State, Company Discounts		\$16.66

64. VCI has properly identified the subscriber line charge applicable to Missouri and calculated its Lifeline rate to include all applicable state and federal discounts to be passed through to Missouri customers.⁸¹

65. After service discounts, VCI will charge a flat rate of \$19.00 per month to provide basic local exchange service with unlimited local calling.⁸²

66. The \$19.00 per month charge does not include 911 taxes, or state and city taxes.⁸³

67. VCI derives this charge with the following calculation:⁸⁴

\$29.99	from Tariff
+ \$ 5.67	Tier I Subscriber Line Charge
\$35.66	Top Line Rate
- <u>\$16.66</u>	Total Discounts
\$19.00	per month

68. After the \$30.00 discount is passed through from USAC or the FCC, VCI will charge a connection fee of \$120.00 payable at the rate of \$10.00 per month for the first 12-month period of service. Consequently, VCI's eligible customers of Lifeline and Link-up service will be charged \$29.00 per month for the first year of service and \$19.00 per month thereafter.⁸⁵

⁸⁰ In his direct testimony, Stanley Johnson, VCI's President, identified the Tier I Subscriber Line Charge as being \$6.50. Hearing Exhibit 1, p. 19, line 24. James E. Stidham, Jr., testifying for AT&T Missouri observed that the correct Subscriber Line Charge for Missouri is \$5.67. Hearing Exhibit 4, p. 10, lines 11-28. In surrebuttal testimony, Mr. Johnson noted that he originally misidentified this charge, and provided a new table of calculations incorporating the charge of \$5.67. This correction does not alter VCI's monthly charge of \$19.00.

⁸¹ Hearing Exhibit 2, p. 2, lines 13-15; Hearing Exhibit 2, p. 5, lines 19-24, p. 6, lines 1-15.

⁸² Hearing Exhibit 1, p. 18, lines 18-28, p. 19, lines 1-13. Transcript p. 28, lines 23-25, pp. 29-30, p. 31, lines 1-6.

⁸³ Transcript p. 33, lines 16-25, p. 34, lines 1-2.

⁸⁴ Hearing Exhibit 2, p.p. 6, lines 1-15. Transcript p. 28, lines 23-25, pp. 29-30, p. 31, lines 1-6.

⁸⁵ Hearing Exhibit 1, p. 18, lines 18-28, p. 19, lines 1-13. Transcript p. 34, lines 3-18.

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69. VCI issues its customer bills on the first day of each month for service being provided for that month. Payment is due by the end of that month or the customer faces disconnection. The customer is thereby extended credit for service being received as opposed to requiring advanced payment before service is delivered. Consequently, VCI is not a prepaid provider.⁸⁶

70. VCI's commitment to provide Lifeline and Link-Up discounts and Missouri Universal Service Fund Discounts satisfies that respective portion of the requirements of 4 CSR 240-3.570(2)(A)(10).⁸⁷

71. Staff compared VCI's rates to subscription fees charged by prepaid providers offering similar or identical services to non-lifeline customers. Based upon this comparison Staff reports that: (1) VCI charges a subscription fee of \$120.00 after applying the Link-Up discount of \$30.00; (2) VCI's subscription fee is much higher than the typical prepaid provider whose subscription fees ranged from \$30.00 to \$69.00; (3) VCI's ongoing monthly recurring rate of \$19.00 for service is among the lowest, if not the lowest, when compared to prepaid companies.⁸⁸

72. Staff's position is that VCI's plan, while not identical to AT&T Missouri's, is comparable.⁸⁹

73. AT&T's position with regard to VCI's compliance with 4 CSR 240-3.570(2)(A)(10) is that VCI's local usage plan is not comparable to AT&T's because VCI is not a prepaid service provider and its rates for service must be comparable to AT&T Missouri's rates.⁹⁰

74. The basic local service rates of VCI are much higher than those of AT&T Missouri, as shown in the representative rates set forth in the table below.⁹¹

⁸⁶ Transcript p. 48, lines 23-25, pp. 49-50, p. 51, lines 1-6, p. 95, lines 17-25, pp. 96-97, p. 98, lines 1-18, p. 104, lines 20-25, p. 105, lines 1-25, p. 106, lines 1-10.

⁸⁷ See Findings of Fact 36, 54, and 61, and their associated footnotes, Footnotes 51, 69, and 75. Commission Rule 4 CSR 240-3.570(2)(A)(10) requires a "commitment" not actual performance. The FCC's March 17, 2005 Order for all ETC applicants, and 47 C.F.R. Sec. 54.202(a)(4), which applies to carriers not regulated by state commissions, require a "demonstration" – not just a commitment, that the ETC applicant offers a local usage plan comparable to the one offered by the ILEC in the service area where it seeks ETC designation.

⁸⁸ Hearing Exhibit 3, p. 3, lines 10-20, p. 4, lines 1-3. Transcript p. 119, lines 18-25, p. 120, lines 1-4, p. 155, lines 3-19.

⁸⁹ Transcript p. 145, line 25, pp. 146-150, p. 151, lines 1-22, p. 154, lines 16-25, pp. 155-156, p. 157, lines 1-20.

⁹⁰ Hearing Exhibit 5, Prefiled Surrebuttal Testimony of James E. Stidham, Jr., p. 3, lines 23-30, p. 4, lines 1-23; Transcript p. 48, lines 7-25, p. 49, lines 1-10 (VCI is not a prepaid provider).

⁹¹ Hearing Exhibit 4, Prefiled Rebuttal Testimony of James E. Stidham, Jr., p. 7, lines 22-26, p. 8, lines 1-4 (including table). Transcript p. 60, lines 17-25, pp. 61-82, p. 83, lines 1-14.

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AT&T Missouri	Group A	Group B	Group C	Group D	Group D 2
Service Rate	\$ 7.15	\$ 10.00	\$ 11.00	\$ 12.00	\$ 13.00
SLC	\$ 5.67	\$ 5.67	\$ 5.67	\$ 5.67	\$ 5.67
End User Cost	\$ 12.82	\$ 15.67	\$ 16.67	\$ 17.67	\$ 18.67
Available Lifeline Discount	\$ 12.67	\$ 12.67	\$ 12.67	\$ 12.67	\$ 12.67
AT&T Lifeline Rate	\$ 0.15	\$ 3.00	\$ 4.00	\$ 5.00	\$ 6.00
VCI Lifeline	\$ 19.00	\$ 19.00	\$ 19.00	\$ 19.00	\$ 19.00
Rate Difference	12,667%	633%	475%	380%	317%

75. Additionally, VCI charges \$120.00, \$150.00 less a Link-up discount of \$30.00, to install Lifeline service, as compared to AT&T Missouri's \$17.26, which is \$34.53 less a Link-Up Discount of \$17.27, to install Lifeline service.⁹²

76. VCI contends that its local usage plan rates are comparable to other competitive ETC's rates.⁹³ VCI, in its brief,⁹⁴ illustrates this comparison in the following table:⁹⁵

⁹² Hearing Exhibit 4, Prefiled Rebuttal Testimony of James E. Stidham, Jr., p. 8, lines 1-4. See also Findings of Fact Numbers 71-74 and their associated footnotes, Footnote Numbers 86-89.

⁹³ Transcript p. 74, lines 8-25, p. 75, lines 1-12, p. 159, lines 23-25, p. 160, lines 1-11, Transcript, Volume 3, Highly Confidential, p. 161-162.

⁹⁴ It is well established legal doctrine that unsworn statements of attorneys or parties, statements in briefs, pleadings, motions, arguments, allegations, or charging documents, as well as articles or exhibits not formally or constructively introduced are not evidence of the facts asserted unless conceded to by the opposing party. *State ex rel. TWA, Inc. v. David*, 158 S.W.3d 232, 236 (Mo. banc 2005) (Judge White Dissenting), *citing to*, *State ex rel. Dixon v. Darnold*, 939 S.W.2d 66, 69 (Mo. App. 1997); *State v. Smith*, 154 S.W.3d 461, 469 (Mo. App. 2005); *Lester v. Sayles*, 850 S.W.2d 858, 864 (Mo. banc 1993); *State v. Rutter*, 93 S.W.3d 714, 727 (Mo. banc 2002); *State v. Robinson*, 825 S.W.2d 877, 880 (Mo. App. 1992); *State ex rel. Horn v. Randall*, 275 S.W.2d 758, 763-764 (Mo. App. 1955). While not all of this information, as submitted in VCI's brief, was introduced at hearing, other data contained within the table is verifiable by reference to the individual company's tariffs on file with the Commission. Specifically, VCI references Pager and Telephone Company's Tariff, eighth revised p. 35, effective September 1, 2005; Fidelity Communications Services I, Inc.'s Tariff, Section 25, 8th Revised Sheet 1, effective May 2, 2007, and Section 26, 2nd Revised Sheet 2, effective August 17, 2006; and Mark Twain Communications Company's PSC MO. NO. 1 Tariff, Section 22, First Revised Sheet 1, effective May 16, 1999.

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Competitive ETC	Retail Rate	Lifeline Discount/Lifeline Monthly Rate	Connection Fee Prorated over 12 Months	Total Monthly Lifeline Rate for 1 st Year of Service	Difference From VCI
VCI Company	\$29.99	\$10.99/\$19.00	\$120.00/\$10.00	\$29.00	N/A
The Pager and Phone Company	\$29.95	\$7.00/\$22.95	\$20.00/\$1.67	\$24.62	-\$4.38
Fidelity Communications Services I, Inc.	\$44.00	\$7.00/\$37.00	\$20.00/\$1.67	\$38.67	+\$9.67
Mark Twain Communications	\$47.60	\$7.00/\$40.60	Unable to find connection fee	\$40.60	+\$11.60

77. The Commission will take official notice of the current tariffs on file for the individual companies listed in VCI's table in Finding of Fact Number 76.⁹⁶

⁹⁵ Post-hearing Brief of VCI Company, p. 26.

⁹⁶ See Footnote Numbers 91-93; See also Exhibit 2, p. 5, lines 13-18; Transcript p. 74, lines 8-25, p. 75, lines 1-12, p. 159, lines 23-25, p. 160, lines 1-11, Transcript, Volume 3, Highly Confidential, p. 161-162.

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78. The Commission's decision on the contested issue of whether VCI satisfies the requirements of 4 CSR 240-3.570(2)(A)(10) is a conclusion of law that the Commission will address in a later part of this order.⁹⁷

79. Commission Rule 4 CSR 240-3.570(2)(B) applies only to commercial mobile radio service (CMRS) providers that are requesting ETC designation and therefore does not apply to VCI.⁹⁸

80. Commission Rule 4 CSR 240-3.570(2)(C) requires VCI to file a plan outlining the method for handling unusual construction or installation charges.⁹⁹

81. Because VCI does not own, operate or manage a telecommunications network, and has no plans to purchase or construct a network, and because service outside of AT&T's Missouri's existing network coverage in VCI's designated service area cannot be provided at a reasonable cost to the company, VCI seeks a waiver of the requirement to provide a plan outlining the method for handling unusual construction or installation charges as required in 4 CSR 240-3.570(2)(C).¹⁰⁰

82. AT&T's position on VCI's requested waiver of 4 CSR 240-3.570(2)(C) is that this subsection pins down exactly how an ETC plans to handle any charges to customers resulting from extending its network upon reasonable request to provide service throughout the area for which it seeks ETC designation and that there is no exception to an ETC's duty to provide such service based on the ETC's "cost recovery" concerns. AT&T further notes that VCI's cost recovery concern is sufficiently addressed by Commission Rule 4 CSR 240-3.570(3)(C)(3)(C), which provides: "Where special conditions or special requirements of the customer involve unusual construction or installation costs, the customer may be required to pay a reasonable portion of such costs in accordance with the plan outlining the method for handling unusual construction or installation charges approved by the commission at the time of designation as an ETC."¹⁰¹

83. The Commission's decision on the contested issue of whether VCI satisfies the requirements of 4 CSR 240-3.570(2)(C) or if a waiver will

⁹⁷ It should be noted that the Office of the Public Counsel ("OPC") did not put on any expert testimony regarding this contested issue. However, in its brief, OPC bases its entire argument against granting ETC designation to VCI upon its claim that VCI's local usage plan is not comparable to AT&T Missouri's.

⁹⁸ Commission Rule 4 CSR 240-3.570(2)(B).

⁹⁹ Commission Rule 4 CSR 240-3.570(2)(C).

¹⁰⁰ Hearing Exhibit 1, p. 14, lines 22-26. Transcript p. 102, lines 13-25, p. 103, lines 1-25, p. 104, lines 1-19.

¹⁰¹ Hearing Exhibit 4, p. 2, lines 33-35, p. 4, lines 26-30, p. 5, lines 1-25.

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be granted is a conclusion of law that the Commission will address in a later part of this order.

Findings of Fact Regarding VCI's Compliance with 4 CSR 240-3.570(3)

84. VCI represents that it will develop a clear and easily understood bill design as required in 4 CSR 240-3.570(3)(A).¹⁰²

85. VCI represents that it will provide customer service contact information on-line and on billing statements as required by 4 CSR 240-3.570(3)(B).¹⁰³

86. VCI represents it will provide the supported services in Missouri as required by 4 CSR 240-3.570(3)(C)(1), 47 C.F.R. Sec. 54.101(a)(1)-(9), and 47 C.F.R. Sec. 54.101(b) as follows.¹⁰⁴

a) Voice Grade Access to the Public Switched Network.

VCI will meet this requirement by providing voice-grade access to the public switched telephone network (PSTN). Through its interconnection arrangements with AT&T Missouri, all customers of the company will be able to make and receive calls on the PSTN within the specified bandwidth.¹⁰⁵

b) Local Usage. (Commission Rule 4 CSR 240-3.570(2)(A)(10)). VCI will offer flat rate, unlimited local service permitting the customer to make an unlimited amount of local calls within his/her local calling area.¹⁰⁶ See previous FOF Numbers 57-78.

c) Dual Tone Multi-Frequency ("DTMF"). (Commission Rule 4 CSR 240-3.570(3)(C)(1)(A)). VCI expects to use out-of-band digital signaling and in-band multifrequency signaling that is functionally equivalent to DTMF.¹⁰⁷

¹⁰² Hearing Exhibit 1, p. 16, lines 21-22, p. 17, line 1; Hearing Exhibit 2, p. 2, lines 16-25, p. 3, lines 1-12.

¹⁰³ Hearing Exhibit 1, p. 17, lines 2-6; Hearing Exhibit 2, p. 2, lines 16-25, p. 3, lines 1-12.

¹⁰⁴ Hearing Exhibit 1, p. 8, lines 19-22, p. 9, lines 1-5, p. 10, lines 7-22, p. 11, lines 1-27, p. 12, lines 1-27, p. 13, lines 1-27, p. 14, lines 1-2; Hearing Exhibit 2, p. 2, lines 16-25, p. 3, lines 1-12.

¹⁰⁵ Hearing Exhibit 1, p. 11, lines 7-18.

¹⁰⁶ Hearing Exhibit 1, p. 11, lines 19-27, p. 16, lines 1-20; Hearing Exhibit 2, p. 2, lines 16-25, p. 3, lines 1-12, p. 4 lines 14-22, p. 5, lines 1-18.

¹⁰⁷ Hearing Exhibit 1, p. 12, lines 4-9; Hearing Exhibit 2, p. 2, lines 16-25, p. 3, lines 1-12.

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d) Single-Party Service. (Commission Rule 4 CSR 240-3.570(3)(C)(1)(B)). VCI will meet the requirement of single-party service by providing its customers with a dedicated message path for all customer calls.¹⁰⁸

e) Access to Emergency Services. (Commission Rule 4 CSR 240-3.570(3)(C)(1)(C) and (D)). VCI will provide all of its customers with access to emergency services by dialing 911 throughout its service areas for which ETC designation is sought through its interconnection agreement with AT&T Missouri in satisfaction of this requirement. VCI will provide its customers access to enhanced 911 service and telecommunications relay service where available and to the same extent that AT&T Missouri, its underlying carrier, provides its customers with access to those services.¹⁰⁹

f) Access to Operator Services. (Commission Rule 4 CSR 240-3.570(3)(C)(1)(H)). VCI will meet this requirement by providing all of its customers with access to operator services provided by AT&T Missouri through its interconnection agreement with AT&T Missouri.¹¹⁰

g) Access to Interexchange Service. (Commission Rule 4 CSR 240-3.570(3)(C)(1)(E)). VCI will meet this requirement by providing all of its customers with the ability to connect with the interexchange carrier of their choice.¹¹¹ VCI will not offer long-distance service.¹¹²

h) Access to Directory Assistance. (Commission Rule 4 CSR 240-3.570(3)(C)(1)(G)). VCI will meet this requirement by providing its customers with access to directory assistance by dialing "411" or "555-1212."¹¹³

¹⁰⁸ Hearing Exhibit 1, p. 12, lines 10-18; Hearing Exhibit 2, p. 2, lines 16-25, p. 3, lines 1-12.

¹⁰⁹ Hearing Exhibit 1, p. 12, lines 21-27, p. 17, lines 7-12; Hearing Exhibit 2, p. 2, lines 16-25, p. 3, lines 1-12.

¹¹⁰ Hearing Exhibit 1, p. 13, lines 1-7; Hearing Exhibit 2, p. 2, lines 16-25, p. 3, lines 1-12.

¹¹¹ Hearing Exhibit 1, p. 13, lines 8-15; Hearing Exhibit 2, p. 2, lines 16-25, p. 3, lines 1-12.

¹¹² Transcript p. 77, lines 13-15, p. 79, lines 12-13.

¹¹³ Hearing Exhibit 1, p. 13, lines 16-22; Hearing Exhibit 2, p. 2, lines 16-25, p. 3, lines 1-12. Transcript p. 54, lines 5-25, p. 55, lines 1-22.

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i) Toll Limitation for Qualifying Low-Income Consumers. (Commission Rule 4 CSR 240-3.570(3)(C)(1)(H)). VCI will provide the toll limitation service that AT&T Missouri has the technological capability to provide to requesting Lifeline eligible customers as required free-of-charge.¹¹⁴

87. VCI makes no affirmative representation as to whether it will comply with 4 CSR 240-3.570(3)(C)(1)(F), which requires an ETC to make available to each end-user subscribing to its supported services access to telecommunications relay services by dialing 711; however, VCI represents that it will comply with all applicable Commission requirements to maintain its ETC status.¹¹⁵

88. VCI represents that it is able to comply with the construction and network extensions requirements in 4 CSR 240-3.570(3)(C)(2) and (3)(C)(3)(A)-(D) to the extent that those provisions require publicizing the construction of new facilities that will enhance services in unserved or underserved areas by advertising the availability of Lifeline and Link-Up services in those areas.¹¹⁶

89. VCI represents that it commits to provide service throughout its proposed designated service area to all customers making a reasonable request for service as required by 4 CSR 240-3.570(3)(C)(3).¹¹⁷

90. VCI represents that it will provide service on a timely basis within its designated service area, where its underlying carrier's network already passes the potential customer's premises as required by 4 CSR 240-3.570(3)(C)(3)(A).¹¹⁸

91. Despite its commitments to provide service to all customers making a reasonable request for service, VCI represents that because it does not own, operate or manage a network, whether it is able to serve a particular subscriber is dependent on where AT&T Missouri's network is located or where AT&T builds out its network.¹¹⁹

¹¹⁴ Hearing Exhibit 1, p. 13, lines 23-27, p. 14, lines 1-2; Hearing Exhibit 2, p. 2, lines 16-25, p. 3, lines 1-12.

¹¹⁵ Hearing Exhibit 1, p. 18, lines 12-16; Hearing Exhibit 2, p. 2, lines 8-15.

¹¹⁶ Hearing Exhibit 1, p. 17, lines 13-18.

¹¹⁷ Hearing Exhibit 1, p. 14, lines 3-7.

¹¹⁸ Hearing Exhibit 1, p. 14, lines 8-13.

¹¹⁹ Hearing Exhibit 1, p. 14, lines 14-22. VCI has asserted that service outside of AT&T Missouri's existing network coverage, in VCI's designated service area, cannot be provided at reasonable cost by the company. See Findings of Fact Numbers 80-82 and their associated footnotes, Footnote Numbers 96-98.

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92. VCI seeks a waiver from having to comply with Commission Rule 4 CSR 240-3.570(3)(C)(3) regarding extension of networks, because VCI contends that these requirements apply only to carriers that have facilities in the ground and have the capability of installing or constructing additional facilities.¹²⁰

93. AT&T Missouri's position is that 4 CSR 240-3.570(3)(C)(3) requires: (1) ETC's to extend their networks to serve new customers upon a reasonable request; (2) this requirement is rooted in 47 U.S.C. Section 214(e)(1); (3) this requirement cannot be waived; and, (4) VCI's commitment to provide service only where the underlying carrier's network already passes the potential customer's premises is insufficient.¹²¹

94. The Commission's decision on the contested issue of whether VCI satisfies the requirements of 4 CSR 240-3.570(3)(C)(3) or if a waiver should be granted is a conclusion of law that the Commission will address in a later part of this order.

95. Commission Rule 4 CSR 240-3.570(3)(C)(3)(D) requires customer notification when there is no possibility of providing service to the ETC customer.¹²²

96. Commission Rule 4 CSR 240-3.570(3)(D) applies only to commercial mobile radio service (CMRS) providers that are requesting ETC designation and therefore does not apply to VCI.¹²³

97. VCI represents that it will maintain a record of Missouri customer complaints received by the company and filed with the FCC as required by 4 CSR 240-3.570(3)(E).¹²⁴

98. As required by 4 CSR 240-3.570(3)(F), VCI represents that it will notify the Commission of any change in company-designed contracts responsible for customer service, repair, maintenance, answering complaints, and authorizing and/or furnishing refunds to customers and any other informational or tariff filing issues.¹²⁵

Findings of Fact Regarding VCI's Compliance with 4 CSR 240-3.570(4)

¹²⁰ Hearing Exhibit 2, p. 3, lines 19-25, p. 4, lines 1-13. See also Footnote 116.

¹²¹ Hearing Exhibit 4, p. 2, lines 25-32, p. 3, lines 16-25, p. 4, lines 1-24.

¹²² Commission Rule 4 CSR 240-3.570(3)(C)(3)(D). Consequently, the Commission does contemplate that there may be limited instances where a carrier designated as an ETC will not be able to provide service.

¹²³ Commission Rule 4 CSR 240-3.570(3)(D).

¹²⁴ Hearing Exhibit 1, p. 17, lines 19-23; Hearing Exhibit 2, p. 2, lines 16-25, p. 3, lines 1-12. Commission Rule 4 CSR 240-3.570(3)(C)(4)(F) requires an annual report of these complaints be submitted to the Commission.

¹²⁵ Hearing Exhibit 1, p. 17, lines 24-27, p. 18, lines 1-2; Hearing Exhibit 2, p. 2, lines 16-25, p. 3, lines 1-12.

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99. Commission Rules 4 CSR 240-3.570(4)(A)-(D) and (H) all apply to carriers that intend to seek federal high cost support, and VCI maintains that it is not seeking reimbursement from any state or federal high cost fund, and; consequently, should not be required to comply with the requirements set forth in these rules.¹²⁶

100. Commission Rules 4 CSR 240-3.570(4)(E)-(G) and (I)-(L) are all applied prospectively after ETC designation approval is granted, and VCI represents that it will comply with all applicable Commission requirements to maintain its ETC status satisfying this requirement at this stage of the designation process.¹²⁷

Findings of Fact Regarding VCI's Compliance with 4 CSR 240-3.570(5)

101. Commission Rules 4 CSR 240-3.570(5)(A)-(F) are all applied prospectively after ETC designation is granted, and VCI represents that it will comply with all applicable Commission requirements to maintain its ETC status satisfying this requirement at this stage of the designation process.¹²⁸

VCI's Additional Representations Concerning its Current Tariff

102. VCI represents that if it is not currently included in its tariff, it will add the company's \$3.99 discount to its tariffs to appropriately reflect the rates of its Lifeline and Link-Up Service offerings.¹²⁹

103. VCI represents that if it is not currently included in its tariff, it will add a provision that requires or binds VCI to offer its customers installment billing of its \$120 connection fee after the Link-up installation charge.¹³⁰

104. VCI represents that its current tariff does not include a provision to address customer situations with how to handle past-due amounts and that it will add such language if granted ETC designation.¹³¹

¹²⁶ Hearing Exhibit 1, p. 7, lines 2-9, p. 14, line 27, p. 15, lines 1-5. Transcript p. 152, lines 18-25, p. 153, lines 1-25, p. 154, lines 1-15. See also Commission Rules 4 CSR 240-3.570(4)(A)-(D) and (H). To the extent that 4 CSR 240-3.570(4)(C)(1)(C) applies to access in rural areas, it may not apply to VCI, should it be designated as an ETC.

¹²⁷ Hearing Exhibit 1, p. 18, lines 12-16; Hearing Exhibit 2, p. 2, lines 8-15. See also Commission Rules 4 CSR 240-3.570(4)(E)-(G) and (I)-(L).

¹²⁸ Hearing Exhibit 1, p. 18, lines 12-16; Hearing Exhibit 2, p. 2, lines 8-15. See also Commission Rules 4 CSR 240-3.570(5)(A)-(F). To the extent that 4 CSR 240-3.570(5)(A) applies to CMRS providers, if would not apply to VCI should the Commission designate it as an ETC.

¹²⁹ Transcript p. 31, lines 7-21, p. 95, lines 2-11.

¹³⁰ Transcript p. 72, lines 6-25, p. 73, lines 1-25, p. 74, lines 1-7.

¹³¹ Transcript p. 80, lines 5-25, p. 81, lines 1-17.

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105. VCI represents that if it is not currently included in its tariff, it will add a provision authorizing the company to impose upon a customer a subscriber line charge of \$5.67.¹³²

106. VCI represents that if it is not currently included in its tariff, it will add provisions spelling out the discounts the customers are entitled to so that the Lifeline rate of \$19.00 per month will be accurately reflected in its tariff.¹³³

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law.

Jurisdiction and Authority

AT&T is a "telecommunications company," an "incumbent local exchange telecommunications company," and a "public utility" as defined in Section 386.020(51), (22) and (42), RSMo 2000, respectively, and; consequently is subject to the jurisdiction, control and regulation of the Commission. AT&T Missouri is duly authorized to provide "telecommunications service" within the State of Missouri as defined in Section 386.020(53).

VCI is a privately held corporation organized under the laws of the State of Washington and is authorized to conduct business as a foreign corporation in the State of Missouri. VCI is a "competitive local exchange carrier" authorized to provide "local exchange telecommunications service" and "exchange access service," as these terms are defined in Section 386.020(9), (31) and (17), respectively, pursuant to its Commission approved certificate of service authority and tariffs.¹³⁴ VCI is subject to the jurisdiction, control and regulation of the Commission,

VCI is not yet providing local exchange or exchange access services in Missouri; however, it expects to provide service in Missouri in AT&T Missouri exchanges using a combination of UNEs, consisting of the local loop, ports and transport, provided by AT&T and resale of AT&T's services. However, pursuant to the FCC's Order *In the Matter of the Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public*

¹³² Transcript p. 84, lines 12-25, p. 85, lines 1-2.

¹³³ Transcript p. 130, lines 22-25, p. 131, line 1.

¹³⁴ See *In the Matter of the Application of VCI Company for Certificate of Service Authority to Provide Basic Local Exchange and Exchange Access Service Throughout the State of Missouri and to Classify the Company as Competitive*, Case No. CA-2006-0323, Effective April 10, 2006; tariff tracking number YC-2006-0878, effective date July 9, 2007.

Utilities Commission, Section 214(e)(1) of the Act does not require a carrier to provide supported services throughout a service area prior to being designated an ETC.¹³⁵

Relevant Statutory Provisions and Commission Rules

The Commission made findings of facts regarding the relevant statutes and rules governing ETC designation. As previously stated, designation as an ETC is governed by the "Act", Titles 47 of the U.S.C. and C.F.R., the FCC's March 17, 2005 Order and Commission Rule 4 CSR 240-3.570.¹³⁶ All findings of fact throughout this Report and Order reciting the relevant portions of these statutes and regulations are hereby adopted by the Commission as conclusions of law.

The Commission acknowledges that Section 214(e)(2) of the Act emphasizes that it is the state commissions who hold the primary authority to grant ETC designation. The Commission further notes that Section 254 of the Act, provides for Universal Service;¹³⁷ a principal component of federal telecommunications policy that seeks to ensure access to telecommunications services for all Americans. One aspect of Universal Service is the availability of subsidies from the USF created by the Act. Only carriers designated as eligible carriers pursuant to Section 214(e) of the Act may receive such subsidies.¹³⁸

Contested Issues of Law and Their Determination by the Commission

The Commission identified five contested issues of law throughout its fact finding and development of the official record in these proceedings. These issues are determinative to the primary issue adopted by the Commission in this case, which was whether VCI meets all of the necessary requirements to receive ETC designation. These contested issues are:

- (1) Can federal and state requirements for ETC designation be bifurcated by a company seeking designation as an ETC to receive only low-income support USFs without seeking forbearance from the FCC?

¹³⁵ In the Matter of the Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission, Report and Order, CC Docket No. 96-45, FCC 00-248, 15 FCC Rcd. 15158, 2000 WL 1801992 (FCC), ¶¶ 1-24 (Adopted July 11, 2000; Released August 10, 2000)(herein after the "August 10, 2000 Order").

¹³⁶ See Finding of Fact Number 9 and corresponding footnote, Footnote Number 10.

¹³⁷ Pub. L. No. 104-104, 110 Stat. 56.

¹³⁸ 47 U.S.C. Section 254(e).

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(2) Does VCI provide a local usage plan that is comparable to the ILEC, AT&T Missouri?

(3) Does VCI satisfy the “own facilities” requirement for the provision of the designated supported services?

(4) Should the Commission grant waivers of Commission Rules 4 CSR 240-3-570(2)(C) and 4 CSR 240-3.570(3)(C)(3), the “build out” requirements to provide the supported services to customers making a reasonable request for service.

(5) Is it in the public interest to grant VCI ETC designation?

Bifurcation and Forbearance Issue

AT&T Missouri argues that VCI must seek forbearance from the FCC in order to pursue ETC designation for only low income support. AT&T's position is that ETC designation cannot be bifurcated into two categories, i.e. creating a category for only low income support vs. high cost support, without FCC approval.¹³⁹ VCI's position is that no forbearance is required because beyond the basic requirements for ETC designation contained in 47 U.S.C. Section 214(e), all other requirements outlined by the FCC are discretionary on the part of state commissions.¹⁴⁰ If the Commission decides that VCI must seek forbearance prior to applying for its limited ETC designation, then it must deny VCI's request.

There is no provision for a bifurcated ETC application process or a low-income only designation in the FCC's rules.¹⁴¹ However, there is also no preclusion in the relevant statutes, regulations or case decisions that would require VCI to obtain forbearance from the FCC before seeking low-

¹³⁹ It should be noted that while AT&T Missouri made this argument in its pre-hearing position statement and at hearing. It did not repeat this argument in its post-hearing brief and focused on three other arguments instead: comparability of local usage plans, VCI's alleged failure to meet the federal “own facilities” requirement, and that granting VCI ETC designation would not be in the public interest.

¹⁴⁰ FCC's March 17, 2005 Order, ¶¶ 61.

¹⁴¹ Hearing Exhibit 5, p. 2, lines 5-33, p. 3, lines 1-21. AT&T Missouri also cited to the *TracFone Wireless* case in support of its argument. This case is distinguished, however, in Footnote 142, *infra*.

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income only ETC designation.¹⁴² The Commission concludes that VCI's application is properly before it to determine the limited designation as an ETC that it seeks.

Comparative Local Usage Plan Analysis

The FCC recommends that state commissions make a case-by-case determination as to whether the applicant for ETC designation has a local usage plan that is comparable to the ILEC and makes no mention of comparing the plan's rates, but rather advocates a multifactor comparison regarding the service that is provided.¹⁴³ The FCC did not, however, set out specific guidelines on how to compare the applicant's local usage plan to that of the incumbent, whereas this Commission did.

VCI may offer a local usage plan with unlimited calling within the customer's local calling area for a flat monthly fee within the same calling scope as AT&T Missouri, but this Commission requires a full comparison between the applicant's plan and the ILEC's, including the rates, terms and conditions of the plans.¹⁴⁴ The Commission's Staff attempted to compare VCI's plan to that of prepaid carriers, where as VCI's president adamantly testified that his company is a "post-paid" provider. VCI attempts to make a comparison of its plan to other ETC providers.

The Commission's Rule is not ambiguous. The comparison of local usage plans is to be made between the ETC applicant and the ILEC, in this case AT&T Missouri. While the language of 4 CSR 240.370(2)(A)(10) indicates the comparison will be made of the plan's rates, terms and conditions "if applicable," the Commission finds that a comparison of rates in this case is definitely applicable. VCI's connection fee and its rates for its local usage plan are in no way comparable to AT&T Missouri's. The Commission finds the local usage plans not to be comparable, and VCI has not satisfied the requirement embodied in Commission Rule 4 CSR 240.370(2)(A)(10).

¹⁴² In, In the Matter of Federal-State Joint Board on Universal Service; Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. Section 214(e)(1)(A) and 47 C.F.R. Section 54.201(l), CC Docket No. 96-45, FCC 05-165, 20 FCC Rcd. 15095, 2005 WL 2171410 (FCC) (Adopted September 6, 2005, Released September 8, 2005), the FCC was asked, by a non-facilities based commercial mobile radio service provider, to grant forbearance from using its own facilities, or a combination of its own facilities and resale of another carrier's services in order to obtain ETC designation to provide only Lifeline service to low-income customers. However, this case was restricted to the determination as to whether Tracfone could be excused from the Act's "own facilities" requirement. No language in this order requires forbearance when seeking to provide services for low-income support only, when a carrier meets the "own facilities" requirement.

¹⁴³ FCC's March 17, 2005 Order, ¶¶ 32-34.

¹⁴⁴ Commission Rule 4 CSR 240-3.570(2)(A)(10).

“Own Facilities” Issue and Interrelated Waiver Issues

AT&T Missouri argues that VCI's offering of Lifeline service under a scenario in which VCI would procure all of the USF-supported services, except for Directory Assistance, by means of resale does not meet the federal “own facilities” requirement. AT&T Missouri claims that VCI does not commit to actual facilities -- whether its own or those of the underlying ILEC that constitute **physical components** of the telecommunications network that are used in the transmission or routing of USF-supported services as defined by the Act.¹⁴⁵ AT&T Missouri further observes that, throughout these proceedings, VCI never once referenced anything even remotely akin to local loops, switches, transmission systems, and network control systems, i.e. physical components of a telecommunications network.

VCI argues that it is committed to and capable of providing service via resale and UNEs. VCI has a Commission approved interconnection agreement and VCI has made arrangements with AT&T to obtain UNEs. At locations near the central office, VCI will utilize UNEs to provide the services supported by Universal Service. Where the customer is located at a distance from the central office, the Company resells the underlying carrier's services. VCI further testified that it is capable of offering directory assistance, one of the supported services, via its own facilities, and as the Commission's findings of fact demonstrate, this meets the outer boundaries of the FCC's prerequisites for facilities-based service.¹⁴⁶

While VCI may technically comply with the basic FCC requirements for providing the USF supported services by utilizing a mixture of its “own facilities” or a combination of its “own facilities” and resale of another carrier's services, this does not end the analysis of this crucial factor. The FCC, and this Commission, adopted additional requirements for approval of ETC status involving the development and expansion of physical facilities within the designated service area which demonstrate the ETC applicant's/provider's commitment to provide the USF supported services.¹⁴⁷

The FCC requires all ETC applicants to demonstrate their commitment to the provision of the supported services by actually providing those services to customers requesting them in their service area and by submitting a formal plan detailing how it will use universal service support to

¹⁴⁵ 47 C.F.R. Section 54.201(e).

¹⁴⁶ See Findings of Fact Numbers 11-13 and 37-39.

¹⁴⁷ See Finding of Fact Number 16.

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improve service within the service areas for which it seeks designation.¹⁴⁸ Specifically, the FCC requires the submission of a five-year plan that describes with particularity the proposed improvements or upgrades to the applicant's network on a wire center-by-wire center basis throughout its proposed designated service area, and a demonstration of how signal quality, coverage or capacity will improve due to the receipt of high-cost support; the projected start date and completion date for each improvement and the estimated amount of investment for each project that is funded by high-cost support; the specific geographic areas where the improvements will be made; and the estimated population that will be served as a result of the improvements.

Similarly, this Commission adopted Rules 4 CSR 240-3.570(2)(A)(2), requiring the submission of a two-year plan similar to that of the FCC's specifications; 4 CSR 240-3.570(2)(C), requiring ETC's to extend their networks to serve new customers upon a reasonable request; and 4 CSR 240-3.570(3)(C)(3), requiring the applicant to submit a plan outlining the method for handling unusual construction or installation charges.

VCI's position is that the federal five-year plan requirement and the Commission's two-year plan requirement are inapplicable to it because it only intends to offer low-income support services. VCI seeks a waiver of 3.570(2)(C) arguing that because it does not own, operate or manage a telecommunications network, and has no plans to purchase or construct a network, that it will have no unusual construction or installation charges. VCI also seeks a waiver of 3.570(3)(C)(3) again claiming that because it has no network whether it is able to serve a particular subscriber is dependent on where AT&T Missouri's network is located or where AT&T builds out its network. VCI also freely admits that it cannot provide service outside of AT&T Missouri's existing network coverage at reasonable rates.

AT&T's position is that these rules are not waiveable because of the mandate for service provision in 47 U.S.C. Section 214(e)(1) and because the purpose of these rules is to pin down exactly how an ETC plans to handle any charges to customers resulting from extending its network upon reasonable request to provide service throughout the area for which it seeks ETC designation.¹⁴⁹ AT&T argues that VCI's cost recovery concern is sufficiently addressed by Commission Rule 4 CSR 240-

¹⁴⁸ FCC's March 17, 2005 Order ¶¶ 21-24; 47 C.F.R. 54.202(a)(1)(ii), 4 CSR 240-3.570(2)(A)(2).

¹⁴⁹ Hearing Exhibit 4, p. 2, lines 25-35, p. 3, lines 16-25, p. 4, lines 1-30, p. 5, lines 1-25. See also Findings of Fact Numbers 82 and 93, and their corresponding footnotes, Footnote Numbers 99 and 119.

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3.570(3)(C)(3)(C). This rule is intended to allow an ETC a method to recover the expenses of build-out when it would be unreasonable for the carrier to absorb them itself. AT&T Missouri points out that “reasonable request for service” refers to a request for service of a type and quantity that is not in excess of the service which is normally requested by like customers and is for service at a location within the carrier’s designated service area.¹⁵⁰ Thus, according to AT&T Missouri, VCI’s statement that it will provide service only where the underlying carrier’s network already passes the potential customer’s premises is insufficient.¹⁵¹

While the Commission has already concluded that VCI could seek ETC designation for low income support and thus 4 CSR 240-3.570(2)(A)(2) could be deemed inapplicable at the Commission’s discretion, AT&T’s position regarding 47 U.S.C. Section 214(e)(1) is well taken. This section of the Act expressly mandates that to receive ETC designation a carrier **must** provide the supported services throughout the service area for which the designation is received. The Commission has the authority to waive 4 CSR 240-3.570(2)(C) and 4 CSR 240-3.570(3)(C)(3); however, the Commission notes that once again VCI is trying to reside on the outside fringes of what this Commission requires for ETC designation. The purpose of these limited “build-out” requirements directly relates to the carrier’s commitment to provide the supported services in the designated service area.

VCI is making the most minimal commitment to satisfy the “own facilities” requirement for the provision of services. The Commission’s rules offer a cost recovery mechanism for build-out to reach customers making a reasonable request for service, and even offer a mechanism for accounting for the fact that there may be instances where there is no possibility of providing service to given customers.¹⁵² Curiously, at hearing VCI asserted that it believes that AT&T has already extended its network to all customers physically able to receive service in its services area,¹⁵³ which negates its reasons or any need for seeking these waivers – assuming, of course, that it intends to follow through on its commitment to provide service to any customer in AT&T’s service area making a reasonable request for service. Because VCI is attempting to dodge all high-cost requirements for constructing any type of network, and dodge the build-out requirements to extend service to other low-income users within the same service area for which it seeks its designation, the Commission concludes that VCI fails to

¹⁵⁰ See 4 CSR 240-3.570(1)(E).

¹⁵¹ Hearing Exhibit 4, p. 2, lines 25-32, p. 3, lines 16-25, p. 4, lines 1-24.

¹⁵² 4 CSR 240-3.570(3)(C)(3)(C) and (D).

¹⁵³ Transcript p. 109, lines 6-25, p. 110, lines 1-19.

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demonstrate an adequate commitment to provide the supported services to the low-income population in Missouri for which it seeks ETC designation.

The Commission also notes that VCI's track record with discontinuing service in the states of Washington and Oregon does not bode well for supporting its representations that it is committed to provide service in Missouri. Additionally, VCI was granted a certificate to provide basic local telecommunication and switched exchange access service in Case No. CA-2006-0323. The certificate became effective April 10, 2006. At the time of hearing, April 18, 2007, VCI admitted that it was not providing service in Missouri. Pursuant to Section 392.410.6, Cum Supp. 2005, because VCI had not provided any service, VCI's certificate of service authority became null and void on April 10, 2007. While the provision of these services is not required prior to receiving ETC designation, the fact that VCI did not follow through on its commitment to provide these services prior to its certificate becoming nullified also does not speak well to its commitment to provide services as an ETC.

Commission Rule 4 CSR 240-2.060(4) requires a party requesting a waiver of a Commission rule to provide complete justification setting out good cause for granting the waiver. Good cause "generally means a substantial reason amounting in law to a legal excuse for failing to perform an act required by law."¹⁵⁴ Similarly, "good cause" has also been judicially defined as a "substantial reason or cause which would cause or justify the ordinary person to neglect one of his [legal] duties."¹⁵⁵ Of course, not just any cause or excuse will do. To constitute good cause, the reason or legal excuse given "must be real not imaginary, substantial not trifling, and reasonable not whimsical."¹⁵⁶ And some legitimate factual showing is required, not just the mere conclusion of a party or his attorney.¹⁵⁷

While VCI may have barely satisfied the most liberal reading of the "own facilities" requirement, the Commission finds that VCI has not provided

¹⁵⁴ *Black's Law Dictionary* 692 (6th ed. 1990).

¹⁵⁵ *Graham v. State*, 134 N.W. 249, 250 (Neb. 1912). Missouri appellate courts have also recognized and applied an objective "ordinary person" standard. See, e.g., *Cent. Mo. Paving Co. v. Labor & Indus. Relations Comm'n*, 575 S.W.2d 889, 892 (Mo. App. W.D. 1978) ("[T]he standard by which good cause is measured is one of reasonableness as applied to the average man or woman.")

¹⁵⁶ *Belle State Bank v. Indus. Comm'n*, 547 S.W.2d 841, 846 (Mo. App. S.D. 1977). See also *Barclay White Co. v. Unemployment Compensation Bd.*, 50 A.2d 336, 339 (Pa. 1947) (to show good cause, reason given must be real, substantial, and reasonable).

¹⁵⁷ See generally *Haynes v. Williams*, 522 S.W.2d 623, 627 (Mo. App. E.D. 1975); *Havrisko v. U.S.*, 68 F.Supp. 771, 772 (E.D.N.Y. 1946); *The Kegums*, 73 F.Supp. 831, 832 (S.D.N.Y. 1947).

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complete justification and has not established good cause to have its request for the rule waivers granted. Given the specifics of VCI's application, the Commission would require compliance with these rules to ensure VCI's commitment to provide the supported services to its targeted customer population in the service area in which it seeks ETC designation. The Commission denies VCI's request to waive, or find inapplicable, the requirements of Commission Rules 4 CSR 240-3.570(2)(C) and 4 CSR 240-3.570(3)(C)(3).

Public Interest Analysis

Section 214(e)(2) of the Act emphasizes that state commissions hold the primary authority to grant ETC designations upon request so long as the commission finds that such designation is consistent with the public interest, convenience and necessity.¹⁵⁸ In the FCC's March 17, 2005 Order, the FCC set forth its public interest analysis for ETC designations stating that it included "an examination of (1) the benefits of increased consumer choice, (2) the impact of the designation on the universal service fund, and (3) the unique advantages and disadvantages of the competitor's service offering."¹⁵⁹

The FCC added that it encouraged state commissions to require ETC applicants over which they had jurisdiction to meet these same conditions and conduct the same public interest analysis, applying these requirements to applicants in a manner consistent with the principle that universal service support mechanisms and rules be competitively neutral.¹⁶⁰ The FCC further stated, "[S]ection 214(e)(2) demonstrates Congress's intent that state commissions evaluate local factual situations in ETC cases and exercise discretion in reaching their conclusions regarding the public interest, convenience and necessity, as long as such determinations are consistent with federal and other state law . . . [and] . . . [f]urthermore, state commissions, as the entities most familiar with the service area for which

¹⁵⁸ A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest. Section 214(e)(2) of the Act.

¹⁵⁹ FCC's March 17, 2005 Order, ¶ 18.

¹⁶⁰ *Id.* at ¶ 19.

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ETC designation is sought, are particularly well equipped to determine their own ETC eligibility requirements."¹⁶¹

The parties' positions regarding whether VCI's request for ETC designation was in the public interest were outlined in detail in the Commission's findings of fact.¹⁶² The Commission concludes that granting VCI ETC designation is not in the public interest.¹⁶³ VCI has not demonstrated that its offered services would benefit Missouri customers or significantly increase the penetration rate of households with telephone service. VCI has not demonstrated that the impact ETC designation would have on the USF, even if minimal, is offset by any benefit the provision of its service would contribute. VCI has not demonstrated any unique advantages it might provide over its competitor's services. In fact, VCI has not demonstrated that it has a comparable local usage plan to that of the incumbent.

This Commission also does not limit its public interest analysis to the three criteria articulated by the FCC. This Commission weighs heavily any applicant's demonstrated commitment to provide services to customers and any societal benefits the provision of such services may promote within this state. For reasons already stated, VCI has not demonstrated an adequate commitment to providing the USF supported services in Missouri.

Finally, VCI's policy of not pursuing the collection of delinquent bills, or final bills, does not promote a societal benefit of encouraging individual customer responsibility. VCI's policy serves to perpetuate further indebtedness by customers who carry unpaid bills from a both a previous provider and VCI, as opposed to working out agreeable payment plans and/or reconnecting service with the previous provider. It also serves to encourage customers to abandon providers or to jump from provider to provider intentionally leaving their bills unpaid. While this policy may serve VCI's own economic self-interest, not to "throw good money after bad" in terms of collection costs, it creates a situation where VCI can collect USF support while leaving a trail of disconnected and indebted customers in its wake. This policy does little to advance telephone penetration rates in Missouri and serves only to enrich VCI.

Decision

In making this decision, the Commission has considered the positions and arguments of all of the parties. Failure to specifically address

¹⁶¹ *Id.* at ¶ 61.

¹⁶² See Findings of Fact Numbers 50-51.

¹⁶³ The Commission notes it found the testimony of AT&T's expert, Mr. Stidham, more credible than VCI's President's testimony on this issue.

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a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision. After applying the facts, as it has found them, to its conclusions of law, the Commission has reached the following decision.

While it doesn't appear that FCC forbearance would be required for VCI to be granted ETC status to seek only low income support, and while many of the federal requirements for ETC designation are considered to be discretionary for state commissions, VCI's application fails for a number of reasons. There is not competent and substantial evidence in the record as a whole to support a grant of ETC designation to VCI because: (1) VCI's local usage plan is not comparable to the ILEC's plan; (2) VCI has not demonstrated an adequate commitment to provide the USF supported services to customers in Missouri; and, (3) granting VCI ETC designation has not been demonstrated to be in the public interest.

For the reasons cited herein, the Commission will deny VCI's application to designate it as an eligible telecommunications carrier.¹⁶⁴

IT IS ORDERED THAT:

1. VCI Company is hereby denied designation as an eligible telecommunications carrier to receive federal universal service fund support for all of the exchanges serviced by Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri.

2. This order shall become effective on August 3, 2007.

Davis, Chm., Murray, Gaw,
Clayton, and Appling, CC., concur
and certify compliance with the
provisions of Section 536.080, RSMo 2000.

¹⁶⁴ Because the Commission is denying VCI's application in total, it does not need to specifically rule on its requested waivers in its ordered paragraphs, although the Commission noted that it would not grant those waivers.

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**In the Matter of the Application of MCC Telephony of Missouri, Inc. for
Waiver of Compliance with the Requirement of 4 CSR 240-32**

Case No. TE-2006-0415

Decided July 24, 2007

Telecommunications §1. The Commission ordered that the Application for Waiver of compliance with requirements of 4 CSR 240-32.080(5)(A)(1) related to time standards for installation of service filed by MCC Telephony of Missouri, Inc., on April 25, 2006 was denied. The Commission found that MCC Telephony had not demonstrated good cause for the Commission to grant it variance from the requirements of 4 CSR 240-32.080(5)(A).

Appearances

Mark W. Comley, Attorney at Law, Newman, Comley & Ruth, 601 Monroe, Suite 301, Jefferson City, Missouri 65102, for MCC Telephony of Missouri, Inc.

Craig S. Johnson, Attorney at Law, Law Office of Craig Johnson, 1648A East Elm, Jefferson City, Missouri 65101, for Missouri Independent Telephone Company Group.

Michael F. Dandino, Deputy Public Counsel, Office of the Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for Office of the Public Counsel and the public.

William K. Haas, Deputy General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission

REGULATORY LAW JUDGE: Cherlyn D. Voss, Regulatory Law Judge

REPORT AND ORDER

Syllabus: In this Report and Order, the Missouri Public Service Commission denies MCC Telephony of Missouri, Inc., a waiver from Commission Rule 4 CSR 240-32.080(5)(A)(1), and declines, at this time, to open a docket to consider whether to make revisions to the quality of service rules contained in 4 CSR 240-32.080(5)(A)(1).

PROCEDURAL HISTORY

On April 25, 2006, MCC Telephony of Missouri, Inc. ("MCC Telephony"), filed its application with the Missouri Public Service Commission for waiver of compliance with requirements of 4 CSR 240-32.080(5)(A)(1) related to time standards for installation of service. MCC

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Telephony cited two factors it claims prevent it from meeting the applicable installation standard. First, its contract with the competitive local exchange company ("CLEC"), Sprint, to provide network interconnection, switching, numbering and other key inputs to its service does not require Sprint to meet that standard. Second, incumbent local exchange companies' ("ILECs") long porting intervals jeopardize MCC Telephony's ability to meet this standard.

On April 28, 2006, the Office of the Public Counsel filed an objection to MCC Telephony's application. On May 1, 2006, Missouri Independent Telephone Company Group ("MITG") filed its Application to Intervene in Opposition to Waiver.¹ MITG opposed MCC Telephony's application on the basis that MCC Telephony, as a Voice Over Internet Provider ("VoIP") provider, should be charged with the same obligations of other certificated local exchange companies ("LECs"), including the members of MITG, in providing such service, including the provisions of 4 CSR 240-32.080(5)(A)(1). The Commission granted MITG intervention on May 12, 2006. No other party requested intervention.

On July 11, 2006, the Staff of the Missouri Public Service Commission filed its recommendation and supporting memorandum concerning MCC Telephony's application. Staff recommended that the Commission open a case to consider whether to make revisions to the quality of service rules applicable to all telecommunications companies in lieu of considering a waiver solely for MCC Telephony. Alternatively, Staff recommended that the Commission deny MCC Telephony's request based upon its belief that MCC Telephony failed to demonstrate good cause for the requested waiver.

On September 20, 2006, the Commission established a procedural schedule that included dates for the filing of prepared testimony, the filing of prehearing position statements and set an evidentiary hearing. The parties filed direct, rebuttal and surrebuttal testimony.

The parties each filed prehearing position statements identifying two primary issues in this case: 1) Is there good cause for the Commission to grant MCC Telephony's request for a waiver of 4 CSR 240-32.080(5)(A); and 2) Should the Commission conduct a rulemaking to revise the Commission's quality of service rules?

The evidentiary hearing was held at the Commission's offices in Jefferson City, Missouri, on January 25, 2007. MCC Telephony, MITC,

¹MITG is comprised of six small rural incumbent local exchange companies, who are classified as Rural Telephone Companies under the Telecommunications Act of 1996. MITG members provide local, basic local, and exchange access services.

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Staff and Public Counsel participated in the hearing. MCC Telephony and Staff presented evidence. Calvin Craib, the Senior Vice President, Business Development for Mediacom Communications Corporation ("Mediacom"), Mark Trefry, Vice President of Telephony for Mediacom, and Darin Liston, Manager Marketing Technical Support for Sprint Nextel Corporation, each testified on behalf of MCC Telephony. Larry Henderson, Telecommunications Technical Specialist II for the Staff, testified on behalf of Staff. During the hearing 9 exhibits were offered and admitted, including the prefiled testimony of the witnesses.

The following third issue was identified during the evidentiary hearing in this case: When a customer agrees to an installation date more than five working days after the customer ordered service, has that customer requested that installation date under 4 CSR 240-32.080(5)(A)(1)(B)? The parties addressed all three issues in two rounds of post-hearing briefs.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. When making findings of fact based upon witness testimony, the Commission will assign the appropriate weight to the testimony of each witness based upon their qualifications, expertise and credibility with regard to the attested to subject matter.

1. MCC Telephony is a Delaware corporation authorized to conduct business in Missouri.²

2. The Commission granted MCC Telephony a certificate of service authority to provide intrastate, interexchange, basic local and nonswitched local telecommunications services in portions of the state of Missouri, and classified those services and the company as competitive in Commission Case No. LA-2005-0150 on May 5, 2005.³

3. Mediacom Communications Corporation is the parent company of MCC Telephony and has cable facilities in the state of Missouri.⁴

4. MCC Telephony currently offers packaged VoIP service, which includes local, national long distance and features in Missouri within the area covered by Mediacom using Mediacom's cable facilities.⁵

² See MCC Telephony's Application for Waiver, filed April 25, 2006, page 1.

³ See May 5, 2005, Order Granting Certificate to Provide Basic Local, Nonswitched Local and Interexchange Telecommunications Services, Case No. LA-2005-0150.

⁴ Craig Direct, Ex. 1, page 2, lines 16-17.

5. On April 25, 2006, MCC Telephony filed an application seeking a waiver from 4 CSR 240-32.080(5)(A)(1), which provides as follows:

(5) The service objectives, surveillance levels and monitoring criteria for the following categories are:

(A) Orders for basic local telecommunications

—

1. Service objective—that ninety percent (90%) or more of such orders shall be installed, except for customer-caused delays, delays caused by a declared natural disaster or a specific exemption requested by a company and approved by the commission staff to address a unique situation —

A. Within five (5) working days after the customer ordered service; or

B. On or by the date requested if it is at least five (5) working days after the date the customer ordered service.

6. As a facilities based provider, MCC Telephony's installation process is different from that of most other carriers, in that, installation of basic local service by MCC Telephony requires a MCC Telephony employee visit to the home or business where the service is to be connected at a time when the prospective customer is home.⁶

7. MCC Telephony provides its voice service through a joint provider arrangement with a competitive local exchange carrier, Sprint Communications Company, L.P. ("Sprint"). Under that agreement Sprint provides network interconnection, switching, numbering and other key inputs to MCC Telephony's service.⁷

8. The terms of the MCC-Sprint Agreement, including installation intervals, were not the result of arbitration, but were negotiated between MCC Telephony and Sprint.⁸

9. Other LECs perform the same steps that MCC Telephony and Sprint perform in installing service, and MCC Telephony does not face any challenges regarding number porting, including the length of porting intervals, not faced by other companies offering basic local service.⁹

⁵ *Id.* at page 2, lines 11-20.

⁶ *Id.* at page 5, lines 3-4, and page 6, lines 7-10.

⁷ Liston Direct, Ex. 5, page 2, line 22 through page 3, line 12 and Tr. pages 45-46.

⁸ Craib Direct, Ex. 1 HC, Schedule 1.

⁹ Tr. page 164, line 18 through page 166, line 21.

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10. MCC Telephony does not meet the Commission's installation standard.¹⁰

11. MCC Telephony does not meet the Commission's installation standard even if ported numbers are excused.¹¹

12. MCC Telephony's prospective customers agree to a specific date for service installation, which is often, if not always, outside the required five-day installation window. However, MCC Telephony does not offer prospective customers an installation date that is within the required five-day period.¹² Further, MCC Telephony does not inform prospective customers about the installation standards.¹³ Accordingly, such scheduled appointments are not customer requested installation dates.

13. After taking a prospective customer's ordering information, MCC Telephony's customer service representative offers that customer the earliest possible time slot a technician is available to complete the installation.¹⁴ Based upon MCC Telephony's failure to complete such installations within the five-day installation period, the Commission finds MCC Telephony has too few installation technicians to complete installations in compliance with the five-day installation standard.

14. There is a cost involved for any company providing voice service to comply with the Commission's five-day installation standard.¹⁵

15. If MCC Telephony can save money on installation costs, it will have an unfair competitive advantage over other companies providing voice service.¹⁶

16. The appeal of Time Warner Cable Information Services, LLC d/b/a Time Warner Cable's ("Time Warner's") tariff filing to withdraw its Digital Phone Service from its tariff, originally assigned Commission Case No. LT-2006-0162, is currently pending before the Cole County Circuit Court as Case No. 06AC-CC00935. The outcome of that appeal could have implications on the authority of State Commissions over cable television companies offering a local voice service.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law:

¹⁰ Henderson Rebuttal, Ex. 6, page 14 line 18 through page 15 line 19.

¹¹ Henderson Rebuttal, Ex. 6, page 8, line 17 through page 9, line 7; and Tr. page 44.

¹² Tr. pages 86, 87 and 132.

¹³ Tr. page 57 and 96.

¹⁴ Trefry Direct, Ex. 3, page 4.

¹⁵ Henderson Rebuttal, Ex. 6, page 9.

¹⁶ Tr. pages 215-216.

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Jurisdiction and Authority

MCC Telephony is a "public utility" and a "telecommunications company" as those terms are defined in Section 386.020(42) and (51), RSMo 2000. As such, it is subject to the jurisdiction of this Commission pursuant to Section 386.250, RSMo 2000. All telecommunications companies offering basic local telecommunications service in Missouri are required to comply with the Commission's quality of service standards contained in Commission Rule 4 CSR 240-32.

Commission rule 4 CSR 240-32.080(5)(A)(1) provides as follows:

(5) The service objectives, surveillance levels and monitoring criteria for the following categories are:

(A) Orders for basic local telecommunications

—

1. Service objective—that ninety percent (90%) or more of such orders shall be installed, except for customer-caused delays, delays caused by a declared natural disaster or a specific exemption requested by a company and approved by the commission staff to address a unique situation —

A. Within five (5) working days after the customer ordered service; or

B. On or by the date requested if it is at least five (5) working days after the date the customer ordered service.

This rule requires a telecommunications company to complete installation of at least of 90% of orders for basic local telecommunications service, not subject to one of the exceptions set out in the rule, within five working days after that service is ordered, or by the date specifically requested by the customer if that customer requests a date that is more than five working days after service is ordered. This rule is designed to ensure customers will generally not have to wait more than five working days for service installation.

Commission rule 4 CSR 240-32.080(5)(A)(1)(B) excuses a telecommunications company from not meeting the five working day installation standard in those instances when a customer requests that his or her service be installed more than five working days after service is ordered. To be said to "request" a specific date under 4 CSR 240-32.080(5)(A)1.B., a customer must be given the choice to have service installed within five working days from the date service is ordered.

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The Missouri Supreme Court has held that a public utility cannot contract around regulation by the Commission.¹⁷

Standard for Approval of Waiver Request

Commission Rule 4 CSR 240-32.101(2) authorizes, for "good cause," an application for temporary or permanent exemption from the requirements of any rule contained in Chapter 32. Although the term "good cause" is frequently used in the law,¹⁸ the rule does not define it. Therefore, it is appropriate to resort to the dictionary to determine its ordinary meaning.¹⁹ Good cause "generally means a substantial reason amounting in law to a legal excuse for failing to perform an act required by law."²⁰ Similarly, "good cause" has also been judicially defined as a "substantial reason or cause which would cause or justify the ordinary person to neglect one of his [legal] duties."²¹

Of course, not just *any* cause or excuse will do. To constitute *good* cause, the reason or legal excuse given "must be real not imaginary, substantial not trifling, and reasonable not whimsical."²² And some legitimate factual showing is required, not just the mere conclusion of a party or his attorney.²³

DECISION

The Commission in making this decision has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates

¹⁷ *May Department Stores v. Union Electric Company*, 107 S.W.2d 41 (Mo. 1937).

¹⁸ *State v. Davis*, 469 S.W.2d 1, 5 (Mo. 1971).

¹⁹ See *State ex rel. Hall v. Wolf*, 710 S.W.2d 302, 303 (Mo. App. E.D. 1986) (in absence of legislative definition, court used dictionary to ascertain the ordinary meaning of the term "good cause" as used in a Missouri statute); *Davis*, 469 S.W.2d at 4-5 (same).

²⁰ *Black's Law Dictionary* 692 (6th ed. 1990).

²¹ *Graham v. State*, 134 N.W. 249, 250 (Neb. 1912). Missouri appellate courts have also recognized and applied an objective "ordinary person" standard. See, e.g., *Cent. Mo. Paving Co. v. Labor & Indus. Relations Comm'n*, 575 S.W.2d 889, 892 (Mo. App. W.D. 1978) ("[T]he standard by which good cause is measured is one of reasonableness as applied to the average man or woman.")

²² *Belle State Bank v. Indus. Comm'n*, 547 S.W.2d 841, 846 (Mo. App. S.D. 1977). See also *Barclay White Co. v. Unemployment Compensation Bd.*, 50 A.2d 336, 339 (Pa. 1947) (to show good cause, reason given must be real, substantial, and reasonable).

²³ See generally *Haynes v. Williams*, 522 S.W.2d 623, 627 (Mo. App. E.D. 1975); *Havrisko v. U.S.*, 68 F. Supp. 771, 772 (E.D.N.Y. 1946); *The Kegums*, 73 F.Supp. 831, 832 (S.D.N.Y. 1947).

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rather that the omitted material was not dispositive of this decision. After applying the facts, as it has found them, to its conclusions of law, the Commission has reached the following decision.

The Commission will address the issues before it in the following order:

- 1) When a customer agrees to an installation date more than five working days after the customer ordered service, has the customer requested that installation date under 4 CSR 240-32.080(5)(A)(1)(B);
- 2) Is there good cause for the Commission to grant MCC Telephony's request for a waiver of 4 CSR 240-32.080(5)(A); and
- 3) Should the Commission conduct a rulemaking to revise the Commission's quality of service rules?

Issue 1: When a customer agrees to an installation date more than five working days after the customer ordered service, has the customer requested that installation date under 4 CSR 240-32.080(5)(A)(1)(B)?

MCC Telephony argues that because its customers agree to a specific date for service to be installed, it has complied with the requirements of 4 CSR 240 32.080(5)(A)(1)(B) if it completes 90% of those installations on the agreed upon dates, even though it does not offer those customers a date that is within the five working days from the date service is requested.

MITG argues that MCC Telephony's installation of service orders by a scheduled appointment is not relevant because such installations do not fall within one of the three exceptions set out in the rule. MITG ignores the "or" between 4 CSR 240-32.080(5)(A)(1)(A) and 4 CSR 240-32.080(5)(A)(1)(B), which requires 90% of installations be completed within five working days, "or B. On or by the date requested if it is at least five (5) working days after the date the customer ordered service."

The question before the Commission here is whether MCC Telephony's installation of service on the date agreed to by the customer satisfies the installation requirement of 4 CSR 240-32.080(5)(A)(1)(B). Staff argues that 4 CSR 240-32.080(5)(A)(1)(B) does not apply, because customers are not offered a date that would comply with the service standards.

The Commission agrees with Staff. As set out above, to meet the requirements of 4 CSR 240-32.080(5)(A)(1)(B), a customer would have to

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“request” a date more than five working days from the date he or she orders service after first being offered an installation date within the five-day window. By simply agreeing to a later installation date, especially when an earlier date is not offered, a customer cannot be said to be requesting that date. Because MCC Telephony does not offer its customers the option of having service installed within five working days from their service request, subparagraph 4 CSR 240-32.080(5)(A)(1)(B) does not apply. MCC Telephony has not complied with the requirements of 4 CSR 240-32.080(5)(A)(1).

Issue 2: Is there good cause for the Commission to grant MCC Telephony’s request for a waiver of 4 CSR 240-32.080(5)(A)?

MCC Telephony contends good cause exists for the Commission to grant it a waiver from the requirements of 4 CSR 240-32.080(5)(A) because it can not comply with those requirements based upon two factors it argues are outside its control. Specifically, MCC Telephony argues that it can not comply because its contract with the CLEC, Sprint, to provide network interconnection, switching, numbering and other key inputs to its service does not require Sprint to meet that standard. Second, MCC Telephony argues that the ILECs’ long porting intervals jeopardize its ability to meet this standard.

The Commission does not find MCC Telephony’s argument persuasive for several reasons. First, given that MCC Telephony voluntarily entered into its service contract with Sprint, it cannot now claim that the terms of that contract are outside its control. Second, MCC Telephony does not face any challenges regarding number porting, including the length of porting intervals, not faced by other companies offering basic local service. Third, MCC Telephony does not meet the Commission’s installation standard even if ported numbers are excluded. Finally, because there is a cost involved for any company providing voice service to comply with the Commission’s five-day installation standard, granting MCC Telephony’s request could give it an unfair competitive advantage over other companies providing voice service. Given the particular circumstances that exist in this case, the Commission finds that MCC Telephony has not demonstrated good cause for the Commission to grant it a variance from the requirements of 4 CSR 240-32.080(5)(A).

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Issue 3: Should the Commission conduct a rulemaking to revise the Commission's quality of service rules?

Proposed federal legislation and recent and prospective decisions by the courts and FCC could impact or even supplant the Commission's authority over cable television companies offering a local voice service in the near future. Therefore, the Commission finds that this is not the appropriate time to conduct a rulemaking to revise its quality of service rules contained in 4 CSR 240-32.080.

IT IS ORDERED THAT:

1. The Application for Waiver of compliance with requirements of 4 CSR 240-32.080(5)(A)(1) related to time standards for installation of service filed by MCC Telephony of Missouri, Inc., on April 25, 2006, is denied.
2. All other motions not specifically ruled upon by the Commission are denied.
3. This Report and Order shall become effective on August 3, 2007.
4. This case may be closed on August 4, 2007.

Davis, Chm., Gaw, Clayton, and
Appling, CC., concur;
Murray, C., dissents;
and certify compliance with the
provisions of Section 536.080, RSMo.

**In the Matter of Missouri Gas Energy's Purchased Gas Adjustment
Tariff Revisions to be Reviewed in its 2000-2001 Actual Cost
Adjustment**

**In the Matter of Missouri Gas Energy's Purchased Gas Cost
Adjustment Factors to be Reviewed in its 1999-2000 Actual Cost
Adjustment**

**In the Matter of Missouri Gas Energy's Purchased Gas Cost
Adjustment Factors to be Reviewed in its 1998-1999 Actual Cost
Adjustment**

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In the Matter of Missouri Gas Energy's Purchased Gas Cost Adjustment Tariff Revisions to be Reviewed in its 1997-1998 Actual Cost Adjustment

*Case Nos. GR-2001-382, GR-2000-425, GR-99-304, and GR-98-167
Decided August 2, 2007*

Evidence, Practice, And Procedure §4. The Commission utilized the *prudence standard* which, recognizes that a utility's cost are presumed to be prudently incurred, and that a utility need not demonstrate in its case-in-chief that all expenditures are prudent. The Commission further recognized that the *prudence standard* is not based on hindsight, but upon a reasonableness standard.

APPEARANCES

Gary W. Duffy, Attorney at Law, Brydon Swearengen & England, 312 East Capitol Avenue, Jefferson City, Missouri 65102 and **Robert J. Hack**, Attorney at Law, 3420 Broadway, Kansas City, Missouri 64111, for Missouri Gas Energy.

Jeffrey A. Keevil, Attorney at Law, Stewart & Keevil, Suite 302, Columbia, Missouri 65201, **Greg L. Musil**, Shughart Thomson & Kilroy, P.C., 32 Corporate Woods, Suite 1100, 9225 Indian Creek Parkway, Overland Park, Kansas 66210, and **Daniel D. Owen**, Shughart Thomson & Kilroy, P.C. 120 West 12th Street, Suite 1700, Kansas City, Missouri 64105, for Riverside Pipeline Company, L.P., Mid-Kansas Partnership, Kansas Pipeline Company (now known as Enbridge Pipelines).

James B. Deutsch, Attorney at Law, 308 East High Street, Suite 301, Jefferson City, Missouri 65101, for City of Joplin, Missouri.

Douglas E. Micheel, Senior Public Counsel, Office of the Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the Public.

Thomas R. Schwarz, Jr., Deputy General Counsel, and **Robert Berlin**, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Morris L. Woodruff

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REPORT AND ORDER

SUMMARY

The Commission finds that its Staff has not demonstrated any imprudent decisions by Missouri Gas Energy regarding its release of capacity on the Kansas Pipeline, its hedging conduct for the winter of 2000-2001, or its storage utilization in that winter. Staff's proposed adjustments to MGE's ACA balances related to those issues are denied.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The Commission in making this decision has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Procedural History

In this consolidated proceeding, the Commission is considering Missouri Gas Energy's Actual Cost Adjustment for four years: Case Number GR-98-167 was established on October 17, 1997, for the purpose of tracking the over-recovery or under-recovery of MGE's natural gas costs for the Actual Cost Adjustment (ACA) period for 1997-1998; Case Number GR-99-304 was established on January 15, 1999, to review MGE's ACA for 1998-1999; Case Number GR-2000-425 was established on January 14, 2000, to review MGE's ACA for 1999-2000; and GR-2001-382 was established on January 9, 2001, to review MGE's ACA for 2000-2001. The Commission consolidated the four cases for all purposes on September 10, 2002.

There were originally four contested issues in this consolidated case relating to adjustments that Staff asked the Commission to make to MGE's ACA balances. The issues are as follows: (1) an adjustment based on the alleged imprudence of MGE's contract with Mid-Kansas Pipeline Company and Riverside Pipeline Company for the interstate transportation of natural gas; (2) an adjustment based on Staff's proposal to impute income to MGE for the release of capacity on the Kansas Pipeline; (3) a disallowance based on MGE's purchasing practices related to hedging; and (4) a disallowance based on MGE's use of storage capacity. In addition,

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MGE contested Staff's recommendation that it be required to revise a previously filed reliability report.

The first issue, regarding the alleged imprudence of the pipeline contract, was previously litigated in Commission Case Number GR-96-450, the case concerning MGE's 1996-1997 ACA. In its Report and Order in GR-96-450, the Commission found that Staff had failed to present competent and substantial evidence sufficient to raise a serious doubt about the prudence of the pipeline contract. For that reason, the Commission rejected Staff's proposed disallowance for the 1996-1997 ACA. The Commission, however, found that it could not determine whether a stipulation and agreement from a still earlier case would preclude prudence reviews regarding that contract in future ACAs. Kansas Pipeline appealed that aspect of the Report and Order.

While that first issue was subject to appeal, the Commission could not address that issue in this case. Rather than wait for the results of that appeal, the Commission decided to set aside the question of the prudence of the pipeline contract and proceed to hear the other issues. Subsequently, the Commission held hearings concerning the other three issues on May 12-15, 2003. During the course of testimony in that hearing, the parties discovered that Staff's witness had used incorrect numbers in calculating a proposed disallowance relating to MGE's use of storage gas in the winter of 2000-2001. The hearing was adjourned to allow the parties to reevaluate their positions in light of those changed figures. Further testimony was filed and the hearing was completed, on November 24, 2003. Staff and MGE filed initial briefs on January 15, 2004. They filed reply briefs and proposed findings of fact and conclusions of law on February 20, 2004.

The appeal of the issue of the prudence of MGE's interstate pipeline contract with Mid-Kansas Pipeline Company and Riverside Pipeline Company followed a convoluted path through the appellate courts until it was finally resolved by a decision of the Missouri Supreme Court issued on January 30, 2007.¹ The Supreme Court held that the Commission was precluded from considering the prudence of that contract by a stipulation and agreement approved by the Commission in an earlier case. In response to the Supreme Court's decision, Staff formally withdrew the contract prudence issue from this case in a notice of withdrawal of issue filed on May 18, 2007. The Commission is now free to decide the remaining issues.

¹ State ex rel. Riverside Pipeline Co. v. Pub. Serv. Comm'n, 215 S.W.3d 76 (Mo. 2007).

The Issues**1. Kansas Pipeline Capacity Release**

MGE leases capacity on several interstate pipelines to ensure its ability to move enough gas through those pipelines to meet its winter peak capacity demand. During the summer months, there is less demand for gas and MGE does not need as much pipeline capacity to move the needed gas. Even though MGE needs less capacity in the summer, when leasing capacity it must enter into a contract with the pipeline that reserves the maximum capacity for the entire year.² MGE compares this situation to a tenant leasing an apartment. The landlord will likely require a lease for a full year, even if the tenant will be on vacation for the month of July. A tenant leasing an apartment who knows that she will be on vacation for a month might try to sublease the apartment while she is away. Such a sublease would be analogous to a pipeline capacity release.

Staff alleges that MGE was imprudent in not releasing its excess capacity on Kansas Pipeline for the months of July through October 2000, and April through June 2001.³ Assuming that MGE could have released its Kansas Pipeline capacity at a rate of 75 percent of the maximum FERC approved rate for the Williams Pipeline, another pipeline on which MGE holds capacity,, Staff contends MGE could have obtained \$1,141,784 in additional revenue by releasing that unused capacity. Recognizing that under an existing incentive sharing mechanism related to capacity release, MGE was entitled to retain 30 percent of capacity release credits that exceed \$900,000, Staff calculated that MGE's ratepayers would have received the benefit of \$858,158 in additional revenue if the capacity had been released. Staff advocates a disallowance in that amount.⁴

In response, MGE established that it obtains revenue by releasing capacity on some of the other pipelines from which it draws gas, including the Williams system.⁵ However, MGE has never obtained any revenue by releasing capacity on the Kansas Pipeline because there is no market for such capacity. In fact, there were no capacity release transactions on the Kansas Pipeline by any shipper, not just MGE, during the period from June 1997, through April 2001.⁶

There are two reasons why capacity release on the Kansas Pipeline is not marketable. First, the commodity charge for transporting gas

² Langston Direct, Ex. 3, page 6, lines 3-4.

³ Sommerer Direct, Ex. 9, Schedule 4.

⁴ Sommerer Direct, Ex. 9, page 6, lines 7-13, and Schedule 4.

⁵ Langston Direct, Ex. 3, page 9, lines 7-8.

⁶ Langston Direct, Ex. 3, page 14, lines 4-14, and Schedule MTL-3.

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on the Kansas Pipeline is substantially higher than the commodity charge on competing pipelines.⁷ While MGE could discount the fixed demand charge portion of the cost of shipping gas on the Kansas Pipeline in order to make a capacity release transaction, it cannot discount the commodity charge.⁸ That means that capacity releases on other pipelines will be cheaper than a capacity release on the Kansas Pipeline, limiting the market for capacity release on the Kansas Pipeline. In addition, the Kansas Pipeline can under-price any possible capacity release on its pipeline by offering interruptible service for which the pipeline company can offer discounted commodity rates, as well as discounted demand rates.⁹ As a result, there is no reason to believe that MGE could have obtained any additional revenue from the marketing of capacity release on the Kansas Pipeline, no matter how aggressively it marketed such capacity.

Indeed, in 2002, after it became aware that Staff intended to raise this issue, MGE attempted to market its idle capacity on the Kansas Pipeline in the manner advocated by Staff. Even when offering a 92 percent discount from the maximum demand rate, MGE found no interest in a release of that capacity.¹⁰

During the course of the proceedings, Staff seemed to recognize that there was no market for the release of capacity on the Kansas Pipeline. Staff then modified its argument to contend that MGE should have released its capacity on the Williams Pipeline, for which there was a market for capacity release, and instead ship the gas it needed on the Kansas Pipeline. The problem with Staff's argument is that, as previously indicated, the cost of shipping gas over the Kansas Pipeline's system is substantially more expensive than the cost of shipping that gas over the Williams Pipeline. Therefore, MGE would need to obtain a fairly high price for its Williams capacity in order to offset the increased cost of shipping gas over the Kansas Pipeline's system.

In calculating its proposed disallowance, Staff arbitrarily estimated that MGE could have sold its Williams Pipeline capacity at 75 percent of the maximum demand charges.¹¹ In fact, the weighted average demand rate actually charged for all capacity releases on the Williams Pipeline during the relevant period was only 14 percent of the maximum demand charge.¹²

⁷ Langston Direct, Ex. 3, page 11, lines 9-19, and Schedule MTL-1.

⁸ Langston Direct, Ex. 3, page 8, lines 13-16.

⁹ Langston Direct, Ex. 3, pages 10-11, lines 16-23, 1-7.

¹⁰ Langston Direct, Ex. 3, page 19, lines 5-7.

¹¹ Sommerer Direct, Ex. 9, pages 5-6, lines 15-23, 1-6.

¹² Langston Direct, Ex. 3, page 21, lines 8-12, and Schedule MTL-8.

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Using the more realistic estimate that MGE's Williams Pipeline capacity could be released at 14 percent of the maximum demand charges, MGE would have experienced \$600,000 in additional costs if it had shipped gas through the Kansas Pipeline system and released Williams capacity as Staff proposed.

2. Hedging Conduct for the Winter of 2000-2001.

This issue concerns events during the winter heating season of 2000-2001. That winter a combination of very cold weather and very high wholesale natural gas prices resulted in painfully high gas bills for consumers. Staff alleges MGE was imprudent by failing to sufficiently hedge its natural gas supply to protect its customers from spikes in natural gas prices. Staff advocates a disallowance of \$130,137 to adjust for MGE's alleged imprudence.

Hedging, for the purposes of this case, describes an attempt by a natural gas local distribution company, such as MGE, to reduce the risk of variability in natural gas prices.¹³ By engaging in hedging practices, the local distribution company is attempting to dampen the effect of price spikes in the market. Of course, when reducing risk by smoothing out the highs in the market price, hedging may also have the effect of smoothing out the lows in those prices. In other words, reducing volatility in market prices may reduce the price consumers pay in some circumstances, and increase that price in other circumstances.

A gas company can engage in hedging through several different means. Physical hedging can be achieved by purchasing natural gas during the summer months when gas prices are generally lower and holding that lower-priced gas in storage for use during the winter months when the market price for gas is generally higher. Physical hedging can also be achieved by using fixed price contracts to lock in the price of gas before the winter season. A gas company can also hedge prices through non-physical means by purchasing financial instruments, such as futures contracts and options, that have the effect of fixing the price of gas.

Staff alleges MGE was imprudent because it did not have a "formal hedging plan or detailed analysis on what it would do in terms of hedging alternatives" before the start of the 2000-2001 winter heating season.¹⁴ Because of this alleged imprudence, Staff calculated a disallowance based on an assumption that MGE should have hedged at least 30 percent of normal gas requirements for each month of the heating season.¹⁵

¹³ Transcript, page 59, lines 9-11.

¹⁴ Transcript, page 392, lines 1-5.

¹⁵ Jenkins Direct, Ex. 12, page 9, lines 18-21.

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Staff initially proposed a disallowance of \$614,365 for MGE's failure to hedge at least 30 percent of normal gas usage for the months of January and March of 2001.¹⁶ However, during the initial portion of the hearing, Staff discovered that it miscalculated the amount of normal gas usage by using some incorrect assumptions. Staff recalculated its estimate of normal gas usage and found that MGE met Staff's 30-percent standard for January, but not for March. Using the corrected estimate, Staff calculated a revised disallowance of \$130,137, based on the company's failure to hedge 30 percent of normal gas usage for March 2001.¹⁷

For the month in which MGE did not hedge at least 30 percent of normal gas usage, Staff estimated a reasonable price at which the company could have hedged those volumes before the start of the heating season. Staff based its price estimate on an average NYMEX closing price for June 1 through October 30, 2000, for delivery in the target month. Staff then subtracted the hedged cost from the actual market price and multiplied the result by the volume of unhedged gas in excess of Staff's 30-percent standard. Through that calculation, Staff arrived at an amount that it contends represents the harm caused to MGE's customers by MGE's failure to hedge sufficient volumes of gas for that month.¹⁸

Staff admits that in the winter of 2000-2001, there was no existing regulatory or statutory requirement that MGE have a "formal hedging plan".¹⁹ Indeed, the Commission did not promulgate a rule concerning hedging obligations by natural gas local distribution companies until December 30, 2003, when Commission Rule 4 CSR 240-40.018 became effective. There was no such rule concerning hedging in effect before the winter of 2000-2001.²⁰

The mere fact that a rule did not exist does not mean that MGE had no obligation to consider a hedging plan. An obligation to hedge to reduce price volatility can be considered a part of the utility's obligation to act in a prudent manner. However, the exact extent of that obligation is not clear. Going into the winter of 2000-2001, there was no national or state industry or regulatory standard concerning how much of a utility's gas supply should be hedged. On the contrary, different states and different utilities engaged in widely varying hedging practices.²¹

¹⁶ Jenkins Direct, Ex. 12, page 12, lines 15-18.

¹⁷ Jenkins Supplemental Direct, Ex. 36, page 5, line 22.

¹⁸ Allee Direct, Ex. 15, pages 6-7, lines 12-23, 1-19.

¹⁹ Reed Direct, Ex. 1, page 35, lines 24-35, (quoting the deposition of Staff witness Sommerer).

²⁰ Transcript, pages 340-41, lines 23-25, 1-2.

²¹ Reed Direct, Ex. 1, page 36, lines 2-10.

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While it was not required to have a formal hedging plan in place for the 2000-2001 winter heating season, MGE had instituted such a plan in the months leading up to that winter. On August 1, 2000, the Commission approved a stipulation and agreement signed by MGE, Staff, and Public Counsel.²² The approved stipulation and agreement authorized MGE to fix the commodity price for 100 percent of MGE's natural gas supplies for the upcoming winter heating season. That would effectively fix the delivered cost to MGE's sales customers for the season.²³

Unfortunately, that approved hedging plan never went into effect. The problem was that the plan included a market price trigger that natural gas prices had to reach before MGE could implement the plan and begin to purchase financial hedging instruments. At the time the agreement was filed, the market price of natural gas was \$3.25 per MMBtu. The hedging plan would be triggered when the market price dropped to or below \$2.25 per MMBtu for five consecutive business days. However, market prices for natural gas continued to rise during the summer of 2000, contrary to historical trends. As a result, the market price trigger was never reached, and the hedging plan never went into effect.²⁴

MGE proposed an amendment to the approved hedging plan to raise the market price trigger to allow the hedging plan to go into effect.²⁵ Staff, however, opposed raising the market price trigger because of a concern that such a change could lock-in high market prices if natural gas prices dropped in the future.²⁶ MGE also filed a request to re-implement a price stabilization fund that had been in effect for the three previous winter seasons. Staff opposed that request, and in an order issued on October 26, 2000, the Commission denied MGE's proposal to re-implement the price stabilization fund.²⁷ In doing so, the Commission directed MGE to "apply reasonable purchasing practices based upon its own evaluation of risks in its gas supply portfolio."²⁸

Aside from the lack of a preexisting requirement that MGE have a formal hedging plan, Staff's calculation of a disallowance based on MGE's

²² In the Matter of Missouri Gas Energy's Fixed Commodity Price PGA and Transportation Discount Incentive Mechanism. 9 Mo. P.S.C. 3d 223 (2000).

²³ Langston Direct, Ex. 3, page 30, lines 4-11.

²⁴ Langston Direct, Ex. 3, pages 30-31, lines 13-22, 1-7.

²⁵ Langston Direct, Ex. 3, page 31, lines 19-23.

²⁶ Langston Direct, Ex. 3, page 32, lines 23-28, quoting the deposition of Staff witness Sommerer.

²⁷ In the Matter of Missouri Gas Energy's Tariff Sheets Designed to Renew for an Additional Year the Price Stabilization Fund, 9 Mo P.S.C. 392 (2000).

²⁸ Id. at 393.

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failure to hedge at least 30 percent of normal gas usage for each month of the winter heating season is not based on any industry or regulatory standard that existed at the time. In fact, Staff did not even formulate the 30-percent standard until the spring of 2002, long after the events at issue in this case.²⁹ Members of Staff simply consulted with each other while preparing this case and selected 30 percent as a reasonable minimum.³⁰ Furthermore, Staff acknowledges that the 30-percent standard should not be viewed as an optimal level or as a precedent for future hedging levels.³¹ Rather, Staff views it as a standard to be applied only to MGE and only for the 2000-2001 ACA period.³²

If measured over the course of the entire winter heating season, MGE met Staff's 30-percent hedging standard for 2000-2001. In fact, for the entire heating season, MGE hedged nearly 40 percent of its normal gas requirements, as calculated using Staff's method.³³ Staff, however, calculated its disallowance based on separate monthly levels of hedging. Thus, while MGE met Staff's 30 percent standard for every other month that winter, for the month of March it hedged only 27.9 percent of normal gas requirements.³⁴ Staff's proposed disallowance is based entirely on MGE's failure to meet the 30 percent standard for that month.

Even if Staff's 30-percent hedging standard is accepted as a reasonable measurement of MGE's obligation to prudently hedge its gas costs, the application of that standard on a month-by-month basis is arbitrary. That is particularly true where, as here, the company had no prior notice that a 30-percent standard would be applied to its hedging decisions. A proper hedging plan is based on anticipated needs for the entire season, not just on monthly variations. As a result, the amounts hedged may appropriately vary from month to month.³⁵ If MGE had known that it was expected to hedge 30 percent in each month, it could have easily held extra gas in storage in February, when it planned to hedge 48 percent of normal gas usage,³⁶ and released it in March to meet the standard for both months.³⁷

3. Storage Utilization in the Winter of 2000-2001.

²⁹ Transcript, page 495, lines 2-7.

³⁰ Transcript, page 531, lines 2-9.

³¹ Transcript, page 355, lines 2-9.

³² Transcript, page 496, lines 2-6.

³³ Langston Supp. Rebuttal, Ex. 29, page 35, lines 20-22.

³⁴ Jenkins Supp. Direct, Ex. 36, schedule 5.

³⁵ Langston Direct, Ex. 3, page 44, lines 12-17.

³⁶ Transcript, page 601, lines 14-17.

³⁷ Transcript, pages 604-605, lines 24-25, 1-8.

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Staff also takes issue with MGE's plan to use gas from storage during the winter of 2000-2001.

MGE, like most local distribution companies, contracts with the interstate pipeline companies to utilize the pipeline's storage capacity to store natural gas. At MGE's request, the pipelines inject gas, which MGE has purchased from a producer, into underground storage facilities. When it needs additional gas to meet the needs of its customers, MGE can withdraw gas from the storage facility and move it through the pipeline.³⁸ At other times, MGE may choose to simply move gas that it has purchased from the producer directly through the pipeline, without utilizing the stored gas. Such gas is known as flowing supply.³⁹

Customer demand for natural gas is higher during the cold winter months when gas is used to heat homes and businesses. During the warm summer months, of course, demand for gas is lower. Therefore, during the summer, MGE, like other local distribution companies, purchases more gas than it needs to meet the immediate needs of its customers and injects that extra gas into storage. That gas is then available to be withdrawn as needed during the winter months.⁴⁰

Since overall demand for gas is lower during the summer months, the price for gas is usually also lower in the summer. Therefore, the cost of gas purchased and injected into storage in the summer is usually lower than the cost of purchasing that amount of gas in the winter. That means a company can use its supply of gas in storage as a hedge to decrease the amount of higher priced gas it must purchase during the winter.

Of course, the amount of gas MGE can store is limited by its contract with the pipelines. Those contracts also place certain restrictions on MGE's right to inject and withdraw gas from storage. For that reason, MGE must carefully plan its withdrawal of gas from storage during the winter months. If it withdraws too much gas from storage too early in the season, it might run short of storage gas later in the season, forcing it to purchase additional higher-priced flowing supplies, or worse, be unable to deliver enough gas to meet the needs of its customers on a particularly cold late winter day.

Staff alleges MGE was imprudent in planning its storage withdrawals for the winter of 2000-2001 because it planned to withdraw too much gas from storage during the relatively warm month of November, leaving less storage gas available for withdrawal during the colder month of

³⁸ Langston Direct, Ex. 3, page 46, lines 6-18.

³⁹ Id. at page 49, lines 1-7.

⁴⁰ Id. at page 46, lines 18-20.

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January, forcing MGE to purchase more expensive flowing gas supplies during that month. MGE calculated its need for flowing gas based on the amount of gas needed to meet baseload demand for that month.⁴¹ Baseload demand is the portion of gas usage that does not vary with outside temperature, such as usage for cooking, water heating, commercial, and industrial processes.⁴² Staff contends MGE should have planned to nominate enough flowing gas at the first of each month to supply gas requirements for the average warmest month, based on historical experience, thus including flowing gas to account for some of the average heat load usage. Because MGE did not do that in the winter of 2000-2001, Staff urges the Commission to reduce MGE's allowed gas costs by \$2,924,398.⁴³

MGE acknowledges that it planned to withdraw a relatively large portion of its storage gas during the month of November.⁴⁴ However, it explains that Staff's proposed gas withdrawal plan is overly simplistic and unworkable, except with the benefit of hindsight.

The problem with Staff's approach is that it would require MGE to nominate its first-of-month flowing gas supply requirement based on the average temperature during the month. Of course, the temperature on any given day during the month vary from the average. A first-of-month nomination obligates the nominating company to move a set amount of gas through the pipeline each day of the month.⁴⁵ If MGE were to nominate more gas into the pipeline than it could deliver to its customers, it would be out of balance and would have to either sell the gas into a low demand, hence a low price, market, or face substantial financial imbalance penalties from the pipelines.⁴⁶

This becomes a problem when the temperatures experienced during a month are particularly volatile, as they are in November, a transition month between autumn and winter. Temperatures, and resulting demand for gas, may vary widely from the historic average in November. If MGE nominated an amount of gas sufficient to meet average needs at the first of the month, then, on days when temperatures are high and demand for gas is low, it would have an over-abundance of gas flowing through the pipeline. This is a particular problem in November, at the start of the

⁴¹ Langston Direct, Ex. 3, page 48, lines 11-13.

⁴² Jenkins Direct, Ex. 12, page 5, lines 21-23.

⁴³ Jenkins Supp. Direct, Ex. 36, page 14, lines 5-6.

⁴⁴ Langston Direct, Ex. 3, page 50, lines 1-4.

⁴⁵ Id. at page 49, lines 1-7.

⁴⁶ Id. at page 53, lines 13-23. See also, Transcript, pages 115-117.

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heating season, because available storage capacity tends to be full and there is nowhere to put the excess gas.⁴⁷ For that reason, MGE uses storage gas in November to manage this variability.⁴⁸

With the benefit of hindsight, Staff's plan for nominating more flowing gas and using less storage in November to save more stored gas for use in January, would have worked reasonably well and would have saved money for MGE's customers in the winter of 2000-2001. That is true, however, only because, as we now know, November 2000 was the second coldest November in the past 40 years,⁴⁹ and because gas prices in January 2001 were higher than they were in November 2000. In November 1999, a warm year, Staff's plan would have saddled MGE with excess amounts of gas on 19 of 30 days. In November 2001, another warm year, MGE would have nominated excess amounts of gas on 22 of 30 days.⁵⁰ Furthermore, in years with costs and weather that are closer to normal, Staff's storage usage plan would have been more costly to MGE's customers than the plan used by MGE. That is so because Staff emphasizes use of flowing gas in November instead of storage gas and in many years flowing gas is actually more expensive in November than it is in January.⁵¹

Staff also criticizes MGE for ordering less first-of-month flowing gas supplies for December 2000 because of an allegedly unsupported belief that prices would drop in December.⁵² By doing so, MGE used more storage gas in December, leaving less available for use in January.

As previously indicated, November 2000 was a very cold month and natural gas prices were very high, reaching what was then a record high on November 22.⁵³ On November 27, the Monday following Thanksgiving, MGE had to make a decision about how much first-of-month flowing gas, at first-of-month prices, to nominate for the month of December. On that day, futures contract prices for natural gas began to decline and the National Weather Service was predicting warmer than normal weather for the next 8-14 days.⁵⁴

Anticipating that gas prices would decline from their historic highs during the month of December, MGE decided to short its nomination of first-

⁴⁷ Transcript, pages 56-57, lines 24-25, 1-22.

⁴⁸ Langston Rebuttal, Ex. 4, page 19, lines 12-17.

⁴⁹ Transcript, page 445, lines 2-5.

⁵⁰ Langston Supp. Rebuttal, Ex. 29, Schedule MTL-43.

⁵¹ Langston Rebuttal, Ex. 4, page 23, lines 5-11.

⁵² Jenkins Direct, Ex. 12, pages 13-14, lines 23, 1-2.

⁵³ Langston Direct, Ex. 3, page 58, lines 13-20.

⁵⁴ Id. at pages 58-59, lines 20-23, 1-9.

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of-month flowing supplies for December by 20,000 MMBtus. By avoiding purchase of that gas at first-of-month prices, MGE planned to either use its lower cost storage to meet the gas needs of its customers, or to repurchase the shorted supplies of gas later in the month at a lower cost, and thereby reduce the cost that would be passed on to its customers.⁵⁵ Unfortunately, contrary to MGE's expectations, the record cold weather lasted into December and prices for gas continued to rise. As a result, MGE had to purchase additional flowing supplies beginning on December 11.⁵⁶

MGE's decision to rely more heavily on storage withdrawals in December was doubly unfortunate because after it had made its decision to under-nominate flowing supplies on November 27, Williams Pipeline told MGE in Mid-December that it had used more gas from storage in November than it believed and consequently had less gas left in storage.⁵⁷ Because it had used more gas from storage in December, MGE was able to pull less gas from storage in January and had to purchase more flowing gas at a higher price.⁵⁸

John J. Reed, a consultant employed by MGE, explained the basis for MGE's belief, at the time it nominated its flowing gas supplies on November 27, 2000, that natural gas prices were likely to drop in December. He indicated that gas prices had been higher than predicted levels for several months. In November, several trade publications predicted that prices would decline.⁵⁹ In addition, the weather forecast for the first part of December was for warmer than normal weather for the central United States.⁶⁰ Furthermore, Reed testified that many other gas companies around the country followed a similar gas nominating strategy based on an anticipated December drop in prices.⁶¹ Reed offered the opinion that, based on what MGE knew at the time, the company's decision to nominate less first-of-month flowing gas for December was prudent.⁶²

4. Reliability Report

⁵⁵ Transcript, page 661, lines 22-25.

⁵⁶ Transcript, page 651, lines 5-8.

⁵⁷ Transcript, pages 671-672, lines 25, 1-9. No party alleged that MGE was in any way negligent in underestimating the amount of gas it had pulled from storage in November. An explanation of the discrepancy between MGE's estimated usage and Williams' usage report may be found on pages 267-273 of the transcript.

⁵⁸ Transcript, page 652, lines 1-3.

⁵⁹ Reed Direct, Ex. 1, page 30-31, lines 14-30, 1-14.

⁶⁰ Langston Direct, Ex. 3, page 59, lines 1-9.

⁶¹ Reed Direct, Ex. 1, Pages 31-32, lines 16-29, 1-7.

⁶² Reed Direct, Ex. 1, page 32, lines 20-22.

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Staff indicated its dissatisfaction with the foundation of the reliability report prepared and filed by MGE for July 1, 2002, through June 30, 2003 and asks the Commission to order MGE to revise that report to address Staff's concerns.⁶³ MGE replies that the additional information that Staff would like to see in a reliability report applies to all LDCs in Missouri and, therefore, Staff should address its concerns in a rulemaking proceeding, rather than through an ACA order.⁶⁴ At the hearing, Staff agreed that it would like to see additional information in the reliability report submitted by all the gas utilities in the state, not just from MGE.⁶⁵

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law.

Jurisdiction

MGE is a public utility, and a gas corporation as those terms are defined in Section 386.020(18) and (42), RSMo 2000. As such, MGE is subject to the Commission's jurisdiction pursuant to Chapters 386 and 393, RSMo Supp. 2006.

Burden of Proof:

Section 393.130.1, RSMo Supp. 2006, requires that all charges made or demanded by any gas corporation be just and reasonable. Section 393.150.2, RSMo 2000, provides that in any hearing involving a rate increase, the gas corporation proposing such rate increase has the burden of proving that the proposed increased rate is just and reasonable. The Commission has also held that the gas corporation has the burden of showing that the gas costs that it proposes to pass on to ratepayers through operation of its PGA tariff are just and reasonable.⁶⁶

The Prudence Standard:

It is not, however, sufficient to state that MGE, as the gas corporation, has the burden of proving that its gas costs are just and reasonable. The fact that Staff is challenging the prudence of incurring some of those costs brings into effect an additional standard, the prudence standard. The Commission established its prudence standard in a 1985 case involving the costs incurred by Union Electric Company in constructing

⁶³ Jenkins Direct, Ex. 12, page 28, lines 15-18.

⁶⁴ Langston Direct, Ex. 3, pages 60-61, lines 22-23, 1-3.

⁶⁵ Transcript, page 496, lines 23-25.

⁶⁶ In the Matter of Tariffs filed by Western Resources, Inc., d/b/a Gas Service, a Western Resources Company, to Reflect Rate Changes to be Reviewed in the Company's 1992-1993 Actual Cost Adjustment, 3 Mo. P.S.C. 3rd 480, 488 (1995).

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its Callaway nuclear plant.⁶⁷ In determining how much of those costs were to be included in Union Electric's rate base, the Commission adopted a standard for determining the prudence of costs that had been established by the United States Court of Appeals, District of Columbia, in a 1981 case.⁶⁸ The standard adopted by the Commission recognizes that a utility's costs are presumed to be prudently incurred, and that a utility need not demonstrate in its case-in-chief that all expenditures are prudent. "However, where some other participant in the proceeding creates a serious doubt as to the prudence of an expenditure, then the applicant has the burden of dispelling those doubts and proving the questioned expenditures to have been prudent."⁶⁹

The Commission, in the Union Electric case, further recognized that the prudence standard is not based on hindsight, but upon a reasonableness standard. The Commission cited with approval a statement of the New York Public Service Commission that:

... the company's conduct should be judged by asking whether the conduct was reasonable at the time, under all the circumstances, considering that the company had to solve its problem prospectively rather than in reliance on hindsight. In effect, our responsibility is to determine how reasonable people would have performed the tasks that confronted the company.⁷⁰

Since its adoption, the Commission's prudence standard has been recognized by reviewing courts⁷¹ and has been accepted by all parties as the standard to be applied in this case.

DECISION

After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decisions regarding the issues identified by the parties.

1. Kansas Pipeline Capacity Release

⁶⁷ In the Matter of the Determination of In-Service Criteria for the Union Electric Company's Callaway Nuclear Plant and Callaway Rate Base and Related Issues. In the Matter of Union Electric Company of St. Louis, Missouri, for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in the Missouri Service Area of the Company, 27 Mo. P.S.C. (N.S.) 183, 192-193 (1985).

⁶⁸ *Anaheim, Riverside, Etc. v. Fed. Energy Reg. Comm'n*, 669 F.2d 799, 809 (D.C. Cir. 1981).

⁶⁹ *Union Electric*, 27 Mo. P.S.C. (N.S.) 183, 193 (1985).

⁷⁰ *Union Electric*, at 194, quoting Consolidated Edison Company of New York, Inc., 45 P.U.R. 4th 331 (1982).

⁷¹ See, e.g. *State ex rel. Associated Natural Gas Company v. Pub. Serv. Comm'n*, 954 S.W.2d 520, 529 (Mo. App. W.D. 1997).

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The evidence demonstrated that there is no market for the release of capacity on the Kansas Pipeline. Furthermore, Staff's alternative allegation that MGE should have used its capacity on the Kansas Pipeline to free up and market capacity on the Williams Pipeline is based on unsupported and unrealistic assumptions about the market value of that capacity. Therefore, MGE acted prudently in not making what would have been futile efforts to market the release of its capacity on the Kansas Pipeline. Staff has failed to present competent and substantial evidence sufficient to raise a serious doubt about the prudence of MGE's action. Therefore, the adjustment proposed by Staff will be denied.

2. Hedging Conduct for the Winter of 2000-2001.

In considering MGE's hedging conduct in the winter of 2000-2001, it is important to remember that the prudence of MGE's conduct must be evaluated based on what MGE knew or should have known at the time, not on 20/20 hindsight. Since the difficult winter of 2000-2001, the hedging practices of Missouri's gas utilities have become much more sophisticated and effective. Thanks to promulgation of new regulations and the wisdom gained from experience, those utilities now have a much clearer understanding of their authority and obligation to engage in hedging to protect their customers from price swings in the marketplace for natural gas.

In the fall of 2000, when MGE was making its decisions about the upcoming winter heating season, things were much different. The Commission had no rule in place upon which MGE could rely in making its hedging decisions. Although Staff criticizes MGE for not having a formal hedging plan in place before the start of the winter, MGE attempted to implement a formal hedging plan in 2000, but it soon became apparent that the price trigger contained in that plan would not be met. MGE made efforts to obtain approval of alternative hedging plans, but on October 26, 2000, just five days before the start of the winter heating season, the Commission rejected those efforts and simply admonished MGE to "apply reasonable purchasing practices based upon its own evaluation of risks in its gas supply portfolio."

Staff attempts to quantify what it believes to be MGE's imprudence by imposing a requirement that MGE hedge a minimum of 30 percent of its normal gas usage for each month of the winter. Staff created that specific requirement entirely after-the-fact and it is essentially arbitrary. Staff testified that the 30 percent monthly requirement seemed like a reasonable minimum requirement but there is no indication that 30 percent is more reasonable than 28 percent or 32 percent, or any other percentage. Yet the number chosen has a substantial impact on the amount of disallowance

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advocated by Staff. Similarly, Staff's application of a 30 percent hedging requirement on a month-by-month basis attempts to impose a new, rigid requirement on MGE, long after MGE had any opportunity to meet such a requirement. MGE's failure to anticipate Staff's after-the-fact imposition of a 30 percent hedging requirement is not a basis for finding that MGE should incur a substantial disallowance for its actions. Staff has failed to present competent and substantial evidence sufficient to raise a serious doubt about the prudence of MGE's action. Therefore, the adjustment proposed by Staff will be denied.

3. Storage Utilization in the Winter of 2000-2001.

The disallowance advocated by Staff is based entirely on hindsight. After the weather and gas prices experienced in the winter of 2000-2001, are known, it is easy to construct a storage utilization plan that would have minimized the costs incurred by consumers. For that particular winter, Staff's plan to base planned storage withdrawals on average monthly temperatures would have met that goal. However, MGE demonstrated why Staff's overly simplified approach would not be desirable, and could actually be more costly to consumers in most years. There is no reason to believe that MGE's storage utilization plan for the winter of 2000-2001 was imprudent.

Staff also argued that MGE's decision to under-nominate first-of-month flowing natural gas for December 2000 was imprudent, or at least unsupported. Again, with the benefit of hindsight, that decision was costly, but the prudence of a decision cannot be measured by its results. MGE explained in detail why it made the decision that it did in November 2000. There is no basis for a finding that MGE's decision was unsupported or imprudent. Staff has failed to present competent and substantial evidence sufficient to raise a serious doubt about the prudence of MGE's action. Therefore, the adjustment proposed by Staff will be denied.

4. Reliability Report

Staff asked the Commission to order MGE to make certain changes to its reliability report filed for July 1, 2002, through June 30, 2003. Staff's concerns about this specific reliability report have become moot due to the delay in issuing this Report and Order necessitated by the appeal of the GR-96-450 decision through the courts. MGE has filed subsequent reliability reports since it filed the challenged report and no practical purpose could be served by requiring it go back and revise the 2002-2003 report. Therefore, the Commission will not require MGE to revise that report.

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5. Other Adjustments

For each of the four actual cost adjustment years addressed in this order, Staff proposed various adjustments and established account balances that were not disputed by MGE. The Commission will order MGE to comply with those undisputed adjustments and establish the appropriate account balances for each of those years.

IT IS ORDERED THAT:

1. The disallowance proposed by Staff regarding Kansas Pipeline capacity release is denied.
2. The disallowance proposed by Staff regarding hedging conduct for the winter of 2000-2001 is denied.
3. The disallowance proposed by Staff regarding storage utilization in the winter of 2000-2001 is denied.
4. Staff's request that MGE be required to revise its reliability report for July 1, 2002, through June 30, 2003, is denied.
5. MGE shall comply with all undisputed adjustments and establish the appropriate account balances for its 1997-1998, 1998-1999, 1999-2000, and 2000-2001 actual cost adjustments.
6. This Report and Order shall become effective on August 12, 2007.

Davis, Chm., Murray, and Appling, CC., concur;
Gaw and Clayton, CC., dissent;
and certify compliance with the
provisions of Section 536.080, RSMo 2000.

In the Matter of Embarq Missouri, Inc.'s Application for Competitive Classification under Section 392.245.5 RSMo (2005)

Case No. TO-2008-0028

August 14, 2007

Telecommunications §40. The Commission ordered that Embarq Missouri, Inc.'s, residential services, other than exchange access service, would be classified as competitive in the Lebanon exchange.

ORDER GRANTING COMPETITIVE CLASSIFICATION

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Syllabus: In this Order, the Missouri Public Service Commission grants Embarq Missouri, Inc.'s, request for competitive classification pursuant to Section 392.245.5, RSMo Cum. Supp. 2006,¹ for residential services, other than exchange access service, for the Lebanon exchange. In addition, the Commission approves the tariff revisions filed to implement this classification.

Procedural History

On July 25, 2007,² Embarq Missouri, Inc. ("Embarq") filed its verified Application for Competitive Classification pursuant to Sections 392.245.5 and 392.245.5(6), in which it requested that the Commission classify the residential services Embarq offers in the Lebanon exchange, other than exchange access services, as competitive. On July 31, 2007, Embarq filed a proposed tariff sheet designed to implement the competitive classification of its services with an effective date of August 30.³

On July 27, the Commission entered its Order Directing Notice, Establishing Procedural Schedule, and Reserving Hearing Date. The July 27 order directed the Commission's Data Center to provide notice of Embarq's application to all certificated competitive local exchange carriers and incumbent local exchange carriers in Missouri, as well as to the General Assembly and the news media. Among other things, the July 27 order also: 1) established a full procedural schedule and reserved Monday, August 13, for an evidentiary hearing on Embarq's application; 2) established an August 1 deadline to request intervention; 3) established an August 3 deadline to file objections to Embarq's application; and 4) directed its Staff to file a recommendation concerning Embarq's application no later than August 3.

Staff filed its verified recommendation and supporting memorandum in favor of approving Embarq's application on August 3, 2007. Staff further recommends that the Commission approve Embarq's revised tariff sheet to go into effect on and after August 30. No requests for intervention or objections to the application were filed.

On August 6, 2007, the Commission issued an order establishing August 8 as the deadline for any party to request a hearing in this case.

¹ Hereinafter all references to the Revised Statutes of Missouri will be to the 2006 Cumulative Supplement unless otherwise noted.

² Unless otherwise specified, all dates refer to the year 2007.

³ Substitute sheets with the same effective date were filed also filed on July 31. The tariff sheets do not adjust Embarq's rates but simply reflect the requested competitive classification in the Lebanon exchange.

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The order further advised the parties that if no request for a hearing was received the remainder of the procedural schedule would be cancelled, including the filing of testimony and hearing, and the Commission would make its determination based upon Embarq's verified application and Staff's verified recommendation and memorandum. No party requested a hearing.

Overview

Embarq is a large incumbent local exchange carrier (ILEC) that is subject to price cap regulation under Section 392.245. Under price cap regulation, maximum allowable rates are established and other restrictions are placed on the ability of the regulated company to raise its rates. The statute that created price cap regulation includes provisions that allow a price cap regulated company to escape regulation when competition develops in the exchanges served by that company. If a carrier obtains competitive status in an exchange it will gain greater pricing flexibility and will be able to raise, or lower, the applicable tariffed rate for its services, except exchange access service, by giving ten days notice to the Commission and affected customers. An ILEC with competitive status in an exchange will have essentially the same pricing flexibility in that exchange as a CLEC.

The Commission must classify the ILEC's services as competitive in any exchange in which at least two other non-affiliated carriers are providing basic local telecommunications services within an exchange.⁴ The statute provides that one commercial mobile radio service provider can be counted as an entity providing basic local telecommunications services.⁵ The other entity that can be counted as providing basic local telecommunications services is one that provides "local voice service in whole or in part over telecommunications facilities or other facilities in which it or one of its affiliates have an ownership interest."⁶ Therefore, an exchange would be competitive in which two or more facilities-based wireline carriers are providing services to customers, or in which one facilities-based wireline carrier and one wireless carrier are providing services to customers.

Embarq's application indicates that it faces competition from at least one wireless carrier and one facilities-based wireline carrier for business services in the Lebanon exchange.

⁴ Section 392.245.5(6), RSMo Cum. Supp. 2006.

⁵ Section 392.245.5(1), RSMo Cum. Supp. 2006.

⁶ Section 392.245.5(2), RSMo Cum. Supp. 2006.

Findings of Fact

The Missouri Public Service Commission, having reviewed Embarq's pending tariff, the verified application and supporting documentation, and Staff's verified recommendation, memorandum and supporting documentation, which are admitted into evidence, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Embarq is a "local exchange telecommunications company" and a "public utility," and is authorized to provide "telecommunications service" within the state of Missouri as each of those phrases is defined in Section 386.020, RSMo 2000.⁷ Embarq is a large ILEC subject to price cap regulation.⁸

In its application, Embarq requested that the Commission classify its residential services, except for exchange access service, in the Lebanon exchange as competitive, and filed proposed tariff sheets.⁹ In support of this request, Embarq filed its verified application including maps of the service territory of wireless carriers in that exchange.¹⁰

Staff also provided its verified recommendation and supporting memorandum in which it discussed its own investigation into the companies providing wireless and wireline service to the exchange. According to Staff's recommendation, the Lebanon exchange for which Embarq requests competitive status has at least one non-affiliated wireless provider and at least one non-affiliated facilities-based wireline carrier providing local voice service to at least two residential customers with addresses within the exchange.¹¹ Furthermore, Staff concluded that "those carriers have local numbers available for use by residential customers in the Lebanon exchange."¹² Finally, Staff recommended that Embarq's accompanying tariff filing, Tariff No. YI-2008-0080, be allowed to go into effect.¹³ Attached to Staff's recommendation and supporting memorandum is a variety of

⁷ Application for Competitive Classification, page 1.

⁸ *Id.*

⁹ *Id.* at Exhibit C.

¹⁰ *Id.* at Exhibit A.

¹¹ Staff Recommendation, page 1, and Appendix A, pages 3-4.

¹² Staff Recommendation, Appendix A, page 4.

¹³ Staff Recommendation, page 1, and Appendix A, page 4.

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documentary materials upon which Staff relied, in part, in reaching its conclusions, including, but not limited to: affidavits from representatives of various wireless providers;¹⁴ responses to Staff's data requests from Fidelity Communications Services I, Inc. ("Fidelity");¹⁵ and exerts from the Local Exchange Routing Guide identifying telephone numbers assigned to specific carriers within the Lebanon exchange.¹⁶

The Commission finds that the facts as submitted in the verified application, verified Staff recommendation and supporting memorandum, and the related attached materials are reliable and support the grant of competitive classification in the requested exchange. The Commission finds that in the Lebanon exchange, facilities-based local voice service is being provided to at least two residential customers by Fidelity. In addition, the Commission finds that there is more than one non-affiliated commercial mobile radio services carrier, including U.S. Cellular and Alltel Communications, Inc., providing service to residential customers in the Lebanon exchange. The Commission further finds that Fidelity and the wireless carriers have local numbers available for use by residential customers in the Lebanon exchange.

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law:

The Commission has jurisdiction over this matter pursuant to Section 392.245.5(6), which provides as follows:

Upon request of an incumbent local exchange telecommunications company seeking competitive classification of business service or residential service, or both, the commission shall, within thirty days of the request, determine whether the requisite number of entities are providing basic local telecommunications service to business or residential customers, or both, in an exchange and if so, shall approve tariffs designating all such business or residential services other than exchange access, as competitive within such exchange.

Embarq is an incumbent local exchange telecommunications company and has requested competitive classification of its business services in the Lebanon exchange.

¹⁴ Staff Recommendation, Appendix A, Attachment B.

¹⁵ Staff Recommendation, Appendix A, Attachment A.

¹⁶ Staff Recommendation, Appendix A, Attachment C.

Section 392.245.5, provides as follows:

Each telecommunications service offered to business customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to business customers within the exchange. Each telecommunications service offered to residential customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to residential customers within the exchange.

For the purpose of determining whether competitive status is appropriate in an exchange, one commercial mobile service provider can be considered an entity providing "basic local telecommunications services."¹⁷ The statute also requires the Commission to consider as a "basic local telecommunications service provider" any entity providing "local voice service in whole or in part over facilities in which it or one of its affiliates has an ownership interest."¹⁸

Section 392.245.5(3), defines "local voice service" as meaning "[r]egardless of the technology utilized . . . two-way voice service capable of receiving calls from a provider of basic local telecommunications services as defined by subdivision (4) of section 386.020, RSMo 2000."

The statute defines "telecommunications facilities" to include, among other items, "lines, conduits, ducts, poles, wires, cables, receivers, transmitters, instruments, machines, appliances and all devices, real estate, easements, apparatus, property and routes used, operated, controlled or owned by any telecommunications company to facilitate the provision of telecommunications service."¹⁹

Embarq is asserting that its residential services in the Lebanon exchange should be classified as competitive. As the party asserting the

¹⁷ Section 392.245.5(1), RSMo Cum. Supp. 2006.

¹⁸ Section 392.245.5(2), RSMo Cum. Supp. 2006.

¹⁹ Section 386.020(52), RSMo 2000.

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positive of a proposition, Embarq has the burden of proving that proposition.²⁰

Because the opportunity for an evidentiary hearing was provided and no proper party requested such a hearing, the Commission may rely on the verified pleadings filed by Embarq and Staff in making its decision in this case.²¹

Decision

The undisputed evidence establishes that for residential customers in the Lebanon exchange there is at least one non-affiliated entity providing local voice service in whole or in part over facilities in which it, or one of its affiliates, has an ownership interest so as to constitute the provision of basic local telecommunications within the meaning of Section 392.245.5(3). Furthermore, the undisputed evidence establishes that for business customers in the Lebanon exchange there is at least one non-affiliated wireless carrier providing basic local telecommunications service within the meaning of Section 392.245.5(1). Therefore, the Commission concludes that Embarq's application for competitive classification of its residential services, other than exchange access services, in the Lebanon exchange should be granted.

As required by the statute, Embarq submitted tariff changes to implement the competitive classification of its services. Those tariff sheets carry an effective date of August 30, 2007. Since the submitted tariff corresponds with the Commission's decision, that tariff will be approved.

IT IS ORDERED THAT:

1. Embarq Missouri, Inc.'s, residential services, other than exchange access service, are classified as competitive in the Lebanon exchange.
2. Embarq Missouri, Inc.'s proposed tariff revisions (Tariff No. YI-2008-0080) are approved to become effective for service on or after August 30, 2007. The tariff approved is:

²⁰ *Dycus v. Cross*, 869 S.W.2d 745, 749 (Mo. banc 1994).

²¹ See, e.g., *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. W.D. 1989); n.3 *supra*.

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3. This order shall become effective on August 30, 2007.

Davis, Chm., Gaw, Clayton,
and Appling, CC., concur.
Murray, C., absent.

Voss, Regulatory Law Judge

**In the Matter of the Application of Southern Missouri Gas Company,
L.P., d/b/a Southern Missouri Natural Gas, for a Certificate of Public
Convenience and Necessity Authorizing It to Construct, Install, Own,
Operate, Control, Manage, and Maintain a Natural Gas
Distribution System to Provide Gas Service in Lebanon, Missouri**

Case No. GA-2007-0212, et al.

Decided: August 16, 2007

Gas §3. The Commission granted Southern Missouri Gas Company, L.P., d/b/a Southern Missouri Natural Gas, a certificate of convenience and necessity for a natural gas distribution system to provide gas service in Houston, Licking, and Lebanon, Missouri, as long as the shareholders, not the ratepayers, bear the risk of any loss caused by the failure to meet the conversion projections

REPORT AND ORDER

APPEARANCES

James M. Fischer, Fischer & Dority, P.C., 101 Madison Street, Suite 400, Jefferson City, Missouri 65101, for Southern Missouri Gas Company, d/b/a Southern Missouri Natural Gas.

Khristine A. Heisinger and **Charles Hatfield**, STINSON MORRISON HECKER LLP, 230 West McCarty Street, Jefferson City, Missouri 65101, for Missouri Propane Gas Association.

Marc D. Poston, Senior Public Counsel, Office of the Public Counsel, Post Office Box 2230, Jefferson City, Missouri, for the Office of the Public Counsel and the public.

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Kevin A. Thompson, General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Nancy Dippell, Deputy Chief.

Syllabus: This Report and Order grants Southern Missouri Gas Company, L.P., d/b/a Southern Missouri Natural Gas, a certificate of convenience and necessity for a natural gas distribution system to provide gas service in Houston, Licking, and Lebanon, Missouri, conditioned on the approval of its financing application and that the shareholders, not the ratepayers, bear the risk of any loss caused by failure to meet the conversion projections.

Procedural History

On December 6, 2006, Southern Missouri Gas Company, L.P., d/b/a Southern Missouri Natural Gas, filed an application for a certificate of convenience and necessity to provide natural gas distribution service to the City of Lebanon, Missouri.¹ On December 12, 2006, Southern Missouri Gas filed an application for approval to issue approximately \$10 million in equity capital and \$50 million in notes and other indebtedness in order to finance the proposed expansion of its system.² On February 15, 2007, Southern Missouri Gas filed an application for a certificate of convenience and necessity to provide natural gas service in Houston, Licking, and Mountain View, Missouri.³ Southern Missouri Gas later withdrew its request to serve Mountain View.⁴

The Missouri Propane Gas Association and Southern Star Gas Pipeline, Inc., were each granted intervention. The three cases were consolidated at the request of Southern Missouri Gas and without objection by the other parties.

The MPGA filed a Motion to Dismiss or in the Alternative to Stay Proceedings pending the outcome of a municipal election set for August 7, 2007, regarding the franchise in Lebanon, Missouri. That motion was denied by the Commission.

The Staff of the Missouri Public Service Commission filed its recommendation on June 13, 2007. Staff recommended conditionally

¹ Case No. GA-2007-0212.

² Case No. GF-2007-0215.

³ Case No. GA-2007-0310.

⁴ Response of Southern Missouri Natural Gas to the Staff Recommendation, p. 2 (filed June 13, 2007).

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granting the certificates but withholding approval of the financing application until Staff has reviewed the final terms and conditions. Staff intends to file an additional recommendation in the financing case. Southern Missouri Gas responded that it agreed with Staff's recommendations and the issuance of a conditional certificate.

An evidentiary hearing was held on July 27, 2007, with all parties being present except Southern Star. Southern Missouri Gas presented two witnesses, Randy Maffett and Joe Knapp. The MPGA presented one witness, Ed Simmons. And, Staff presented two witnesses, Tom Solt and David Murray. The Commission received 16 exhibits into evidence.

On August 10, 2007, a Notice of Election Results was filed. The Commission notified the parties that it intended to take official notice of the election results and no party objected. Therefore, the Commission hereby takes official notice of the election results of the August 7, 2007, election in the City of Lebanon, Missouri.

Briefs were filed on August 13, 2007. Southern Star did not participate in this matter after it was granted intervention.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact:

1. Southern Missouri Gas is a Missouri limited partnership with its primary business address at: 301 E. 17th Street, Mountain Grove, Missouri 65711.

2. Southern Missouri Gas "owns and operates a natural gas transmission and distribution system located in southern Missouri which serves approximately 7,500 residential, commercial and industrial customers."⁵

3. Approximately 6,800 of Southern Missouri Gas's current customers are residential customers.⁶

4. Southern Missouri Gas is the successor to Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company, L.C., which was granted a certificate of convenience and necessity to construct and operate a natural gas distribution system in several municipalities, including Houston and Licking, Missouri, in the spring of 1995.⁷

⁵ Exhibit 2, para. 1.

⁶ Transcript, p. 70, lines 16-18.

⁷ See, Case No. GA-94-127, Order Approving Tariffs and Authorizing the Commencement of Construction of Gas Facilities (issued April 14, 1995), and Order Granting Certificate of Convenience and Necessity for Mountain View, Missouri, and Authorizing Construction of

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5. In the GA-94-127 Report and Order, Tartan Energy was found to be financially and technically qualified to provide natural gas service. The Commission also determined that it was in the public interest for Tartan Energy to be granted a certificate of convenience and necessity in ten communities, including Houston and Licking.⁸

6. A trunkline and distribution facilities authorized in Case No. GA-94-127 was constructed; however, Southern Missouri Gas did not complete the trunkline and distribution systems in Houston and Licking.⁹

7. Southern Missouri Gas currently serves the communities of Rogersville, Marshfield, Ava, Norwood, Mountain Grove, West Plains, Willow Springs, Cabool, and Mansfield.¹⁰

8. Southern Missouri Gas is owned by Sendero SMGC GP Acquisition Company, LLC (2%), and Sendero SMGC Limited Acquisition Company, LLC (98%). Southern Missouri Gas is the only asset owned by these two entities. Sendero SMGC GP Acquisition Company, LLC, and Sendero SMGC Limited Acquisition Company, LLC, are owned by Sendero Capital Partners Missouri, LLC (4.5590%), CHx Capital Missouri, Inc. (93.0639%), and Michael J. Lewis (2.3771%). Randy Maffett owns Sendero Capital Partners Missouri, LLC, and Alex Cranberg owns CHx Capital Missouri, Inc.¹¹

9. Sendero SMGC GP Acquisition Company, LLC, and Sendero SMGC Limited Acquisition Company, LLC, have no assets other than their interests in Southern Missouri Gas.¹²

10. Southern Missouri Gas has a management agreement with Sendero Asset Management, LLC, for which Southern Missouri Gas compensates Sendero Asset Management approximately \$200,000 annually.¹³

11. The ownership of Southern Missouri Gas has been in its current structure since 2005.¹⁴

Distribution Facilities in Mountain View, Missouri, and in Texas and Wright Counties (issued May 19, 1995).

⁸ Report and Order, In re Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company, for a Certificate of Convenience and Necessity, Case No. GA-94-127, 3 Mo. P.S.C. 3d 173 (September 16, 1994).

⁹ Ex. 5, para. 4.

¹⁰ Tr. p. 73, lines 21-23.

¹¹ Ex. 10; Tr. p. 77, lines 4-8; and, Tr. p. 131, lines 4-9 and 17-19.

¹² Tr. p. 77, lines 9-24, and p. 78, lines 15-24.

¹³ Tr. p. 77, line 25, through p. 78, line 9.

¹⁴ Tr. p. 42, line 20.

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12. The ownership structure set out in Exhibit 10 will change with the addition of investors through the proposed financing; however, the final ownership structure is not yet known.¹⁵

13. In the first two years, the current owners have reinvested \$1.5 million into the Company and have not taken any distributions out of the Company.¹⁶

14. Southern Missouri Gas has been prohibited by its current lender from taking any distributions for at least three years.¹⁷

15. On December 6, 2006, Southern Missouri Gas filed an Application requesting a certificate of convenience and necessity for a local distribution system serving Lebanon, Missouri.¹⁸

16. On December 12, 2006, Southern Missouri Gas filed an application for approval to issue approximately \$10 million in equity capital and \$50 million in notes and other indebtedness in order to finance the proposed expansion of its system.¹⁹

17. On February 15, 2007, Southern Missouri Gas filed an application for a certificate of convenience and necessity to provide natural gas service in Houston, Licking, and Mountain View, Missouri.²⁰

18. Southern Missouri Gas later withdrew its request to serve Mountain View.²¹

19. Attached to the Application in Case No. GA-2007-0212 was a map depicting the service territory requested to be included in the certificate of convenience and necessity.²² The Application in Case No. GA-2007-0310 also included by reference the map attached to an earlier application for a certificate in the Houston and Licking areas.²³

20. The maps consisted of line drawings with the city locations noted and, in the case of the Houston and Licking map, the mileage between points was also included.

21. More detailed maps were submitted to the Staff but not filed in the official case file.²⁴

¹⁵ Tr. p. 134, line 5 through p. 135, line 19.

¹⁶ Tr. p. 137, line 22, through p. 138, line 5.

¹⁷ Tr. p. 295, lines 8-12.

¹⁸ Ex. 2.

¹⁹ Ex. 7, para. 4..

²⁰ Ex. 5.

²¹ Response of Southern Missouri Natural Gas to the Staff Recommendation, p. 2 (filed June 13, 2007).

²² Ex. 2, Appendix B.

²³ Ex. 5, p. 3 (referencing Case No. GA-94-127).

²⁴ Tr. p. 267, line 11.

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22. No party claimed any prejudice or harm due to the quality of the maps Southern Missouri Gas filed with its applications.

23. The certificate applications also included either an attached list of metes and bounds descriptions²⁵ or a reference to a metes-and-bounds description.²⁶

24. The metes and bounds descriptions in conjunction with the maps provide sufficient information for a Commission determination of the proposed service territory.

25. Each of the certificate applications included a financial feasibility study for the proposed expansion.²⁷

26. The Application in GA-2007-0212 included a list of ten persons residing in or who are landowners within the proposed Lebanon service area.²⁸

27. The Application in GA-2007-0310 included a reference to a list of ten persons residing in or who are landowners within the proposed Licking and Houston service areas.²⁹

28. The Cities of Houston and Licking have granted a natural gas franchise to Southern Missouri Gas.³⁰

29. The Council of the City of Lebanon passed an ordinance granting Southern Missouri Gas a natural gas franchise on January 16, 2007.³¹

30. Each of the franchise agreements gives the respective cities the option to purchase the distribution system within it for the net book value plus 15%.³²

31. None of the franchise agreements were exclusive.³³

32. On August 7, 2007, the City of Lebanon held an election at which the citizens of the municipality overwhelmingly voted to grant Southern Missouri Gas a natural gas franchise.³⁴

33. State and county road right-of-way agreements have also been granted in areas where the distribution pipes will be laid.³⁵

²⁵ Ex. 2, Appendix C.

²⁶ Ex. 5, p. 3 (referencing Case No. GA-94-127).

²⁷ Ex. 4P and Ex. 6HC.

²⁸ Ex. 2, Appendix E.

²⁹ Ex. 5, referencing Case No. GA-94-127.

³⁰ Ex. 5, Appendix D.

³¹ Ex. 3.

³² Ex. 5, Appendix D, and Ex. 3.

³³ Ex. 5, Appendix D, and Ex. 3.

³⁴ *Notice of Election Results*, filed August 10, 2007.

³⁵ Tr. p. 143.

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34. Southern Missouri Gas proposes to use its current tariff rates and regulations for natural gas service in the expanded areas.³⁶

35. Attached to the Application in Case No. GF-2007-0215 was a financing plan in accordance with Commission rules. The financing plan included a description of the expected rates, terms and conditions for the debt securities, as well as a pro-forma balance sheet and income statement "showing the effect of the issuance of the equity capital and the debt securities" on the company.³⁷

36. The financing application also contained a five-year capital expenditure schedule.³⁸

37. The financing arrangement is expected to increase Southern Missouri Gas's working capital credit line to \$25 million.³⁹

38. The increase in working capital will improve the Company's working capital structure.⁴⁰

39. Natural gas distribution companies need large amounts of working capital because of the delay between the purchase of natural gas and receipt of payment from the ultimate consumer.⁴¹

40. The equity investors will be one or more of "three large accredited institutional investors, all of whom are experienced in the energy and specifically the natural gas and distribution businesses."⁴²

41. Southern Missouri Gas is currently still engaged in negotiations with potential investors and, once its negotiations are complete, will file an amendment to its financing application with supporting documentation.⁴³ The exact terms and conditions of the proposed financing will not be known until that time.⁴⁴

42. Having regulatory approval of the expanded certificate will aid Southern Missouri Gas in obtaining the financing.⁴⁵

43. Southern Missouri Gas will not be able to complete the proposed expansion to Lebanon, Houston, and Licking without obtaining financing.⁴⁶

³⁶ Ex. 2, para. 9, and Ex. 5, para. 8.

³⁷ Ex. 7, para. 7; and Ex. 8P.

³⁸ Ex. 7, Appendix E.

³⁹ Ex. 8; Tr. p. 296, lines 15-21.

⁴⁰ Tr. pp. 298-299.

⁴¹ Tr. p. 150, line 17, through p. 151, line 2; and Tr. p. 295, line 18, through p. 297, line 4.

⁴² Tr. p. 66, lines 16-19; Ex. 19, p. 3.

⁴³ Tr. pp. 66-67.

⁴⁴ Tr. p. 290.

⁴⁵ Ex. 5, para. 13; and Tr. p. 140.

⁴⁶ Tr. p. 90, lines 11-14.

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44. Even though Southern Missouri Gas is in the final stages of negotiations, it has no commitments for financing.⁴⁷

45. Staff recommended granting the certificate conditioned on the financing being approved. Staff will make a recommendation regarding the financing application as soon as possible after the final terms and conditions are made available to Staff.⁴⁸

46. Staff expressed concerns about the valuation of the Company in its audited financial statements as compared with its annual reports. Staff's concern is that the potential investors understand the proper valuation of the Company.⁴⁹

47. The feasibility studies include engineering cost estimates, estimates of system demand, plans for financing, revenues and expenses during the first ten years of operation, and proposed rates and charges.⁵⁰

48. The inputs to the feasibility studies included: estimated household data based upon federal census data, conversion to natural gas of various types of existing customers, various costs associated with providing service to existing and new areas, proposed capital expenditures, and other assumptions.⁵¹

49. The feasibility studies also contain a sensitivity analysis of the total projected demand for natural gas which was estimated to be 50%⁵² of the current households that Southern Missouri Gas determined currently use propane gas.

50. It has been Southern Missouri Gas's experience in similar communities in the area that approximately 52% of propane-using households will convert to natural gas over a five-year period after it becomes available.⁵³

51. The number of households currently using propane was determined by counting propane tanks during a visual walk through of the area.⁵⁴

52. Based on Southern Missouri Gas's experience, about 20% to 30% of all-electric households will convert to natural gas.⁵⁵

⁴⁷ Tr. p. 91, lines 12-22.

⁴⁸ Ex. 19.

⁴⁹ Ex. 19; and Tr. pp. 274-279.

⁵⁰ Ex. 4P; Ex. 6HC.

⁵¹ Ex. 19, p. 2.

⁵² Mr. Maffett testified that the actual "take rate" for Southern Missouri Gas was 52% but the number was rounded for ease of use and to assure a conservative estimate. Tr. pp. 61 and 97.

⁵³ Tr. p. 61.

⁵⁴ Tr. p. 88.

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53. In the event that the expected conversion rate is not achieved, Southern Missouri Gas shareholders expect to absorb the loss instead of the ratepayers.⁵⁶

54. New developments are expected to have a higher "take rate" than in the older neighborhoods where conversion from propane or electricity to natural gas might be required.⁵⁷

55. After the first five years, Southern Missouri Gas expects growth of 1.5% to 2.0% annually.⁵⁸

56. In addition to its review of the Company's inputs, "Staff analyzed the effects of various changes to the assumptions, substituting more conservative estimates in place of some of the Company's inputs. Staff made the following adjustments to the Company's model: growth rates were replaced by the Company's actual growth experienced on the existing system from 1995 to 2000; Staff removed all gas sales revenue and expense; added inflation during 2007 for the current SMNG system; tripled the distribution cost per customer from \$500 to \$1,500; added an allowance for interest on working capital; and doubled the estimated pipeline cost from \$9,750,000 to \$19,500,000."⁵⁹

57. Staff evaluated the feasibility of these projects "by looking at the internal rate of return (IRR) for the project over the twenty (20) years covered by the model plus a terminal value. A hurdle rate of ten percent (10%) was considered to be the break point for feasibility. The IRR produced in the model, as adjusted by Staff, is thirteen percent (13%)."⁶⁰ The model, using the numbers submitted by Southern Missouri Gas, produced an IRR of 41%.⁶¹

58. Staff's conclusion was that even with the more conservative inputs the expansion project is economically feasible, though not completely without risk.⁶²

59. One risk identified by Staff is that the customer conversion rate from propane to natural gas will be affected by entrenched competition from propane dealers, whose prices and business practices are unregulated.⁶³

⁵⁵ Tr. p. 61.

⁵⁶ Tr. pp. 75-76.

⁵⁷ Tr. pp. 123-124.

⁵⁸ Tr. p. 152, line 4.

⁵⁹ Ex. 19, p. 2.

⁶⁰ Ex. 19, p. 3.

⁶¹ Ex. 19, p. 3.

⁶² Ex. 19, p. 3; and Tr. p. 251.

⁶³ Tr. p. 248 lines 5-13.

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60. There are no regulated gas suppliers in the areas where expansion of the certificate is requested.⁶⁴

61. The propane gas market is very competitive in Lebanon. There are seven propane dealers in the city and five or six others in the surrounding area.⁶⁵

62. Using information from the Energy Information Administration, the residential price per gallon of propane on March 12, 2007, was \$1.68, which equates to an equivalent price per Ccf of natural gas of \$1.83.⁶⁶

63. The purchased gas adjustment (PGA) rate for Southern Missouri Gas in March was \$0.95 per Ccf. Since the price of propane is a delivered price, Staff calculated the delivered price of 1,000 Ccf of natural gas to compare with the equivalent of 1,000 Ccf of propane. This was done by adding the commodity charge of \$0.357 and the customer charge of \$0.12 to the price per Ccf of natural gas. The customer charge equivalent was determined by dividing the \$120.00 customer charge for 12 months by 1,000. The cost of 1,000 Ccf of natural gas, calculated this way, would be \$1,427, whereas the price of 1,000 Ccf of propane would be \$1,834.⁶⁷

64. The price of propane would have to drop to approximately \$1.307 per gallon to be competitive with natural gas.⁶⁸

65. Per MMBTU, Southern Missouri Gas can deliver natural gas for about \$13.00 compared to about \$20.00 per MMBTU for propane.⁶⁹

66. Natural gas is cheaper for heating than propane,⁷⁰ and cost-competitive with electricity and fuel oil.⁷¹

67. Because propane is not regulated, propane dealers have more flexibility than natural gas distributors in setting prices.⁷²

68. The availability of natural gas would allow energy consumers in Lebanon, Houston, and Licking to reduce their energy costs.⁷³

69. The availability of natural gas in Lebanon, Houston and Licking would create competition with other energy providers that could drive energy prices down for all customers.⁷⁴

⁶⁴ Ex. 2, para. 10, and Ex. 5, para. 9.

⁶⁵ Tr. p. 206, lines 11-14.

⁶⁶ Ex. 19, p. 3.

⁶⁷ Ex. 19, p. 3.

⁶⁸ Ex. 19, p. 3.

⁶⁹ Tr. pp. 62-63.

⁷⁰ Tr. p. 62.

⁷¹ Tr. p. 63, lines 6-9.

⁷² Tr. 101, lines 7-17.

⁷³ Tr. p. 58, line 17, through p. 59, line 3, and p. 109, lines 7-14.

⁷⁴ Tr. pp. 108-109.

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70. Authorizing Southern Missouri Gas to provide natural gas service will benefit the public by offering another choice of energy providers, increasing “operational convenience,” and potentially decreasing energy costs.⁷⁵

71. If businesses reduce their energy costs, they may also reduce their retail costs or add employees.⁷⁶

72. Joe Knapp is the City Administrator for Lebanon. His duties include economic development for that city.⁷⁷ Mr. Knapp testified that creation of a competitive energy market in Lebanon would result in the creation of jobs in the community.⁷⁸

73. Mr. Knapp identified three instances where economic development opportunities were lost when new businesses failed to consider Lebanon a viable alternative because of the lack of available natural gas.⁷⁹

74. Mr. Knapp estimated the combined impact of these lost opportunities was 200 additional jobs and \$180 million of capital investment into the Lebanon community.⁸⁰

75. The cost of municipally supplied electricity in Lebanon is expected to increase by 30% to 40% in the future.⁸¹

76. Lebanon is a manufacturing community, with approximately 6,000 industrial jobs. The manufacturers in Lebanon include Emerson, Durham, Carr Industries, DTE Metal Products, Precision, Bass Tracker, Landau Boats, and G3 Boats. Another large employer in the area is St. John's Hospital.⁸²

77. Mr. Knapp testified that the availability of natural gas would help Lebanon attract new industry because natural gas availability is often requested by prospective employers.⁸³

78. Existing industries in Lebanon have also requested that the City of Lebanon seek out natural gas service.⁸⁴

⁷⁵ Tr. pp. 58-59.

⁷⁶ Tr. p. 163, lines 2-8.

⁷⁷ Tr. p. 178, line 14, through p. 179, line 15.

⁷⁸ Tr. p. 180, lines 5-12.

⁷⁹ Tr. pp. 180-81.

⁸⁰ Tr. p. 181.

⁸¹ Tr. p. 183, lines 16-22.

⁸² Tr. p. 199, lines 8-16.

⁸³ Tr. pp. 180-81.

⁸⁴ Tr. p. 184.

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79. The City of Lebanon issued requests for proposals (RFPs) to 20 natural gas suppliers and received two bids. Southern Missouri Gas was the winning bidder.⁸⁵

80. The addition of natural gas service in the City of Lebanon will result in the creation of jobs in the community by allowing the city to attract new industries and aiding its existing industrial base.⁸⁶

81. The City of Lebanon originally passed an ordinance authorizing a natural gas franchise in the 1960s but no natural gas service to the city was constructed.⁸⁷

82. The total number of households is approximately 6,000 in Lebanon, and 1,000 each in Houston and Licking.⁸⁸

83. There is a public need for natural gas and transportation service in Lebanon.⁸⁹

84. Members of the MPGA have propane gas customers in Missouri Southern Gas's proposed service territory.⁹⁰ Peak-shaving plants and standby plants are propane-based facilities used in areas where natural gas pressure is inadequate in peak usage periods. Such facilities are used in Springfield, Waynesville and Fort Leonard Wood. The use of such facilities has the effect of causing propane prices to rise.⁹¹

85. The effect of the introduction of natural gas into a propane market is to substantially reduce the demand for propane. This necessarily raises costs for those propane customers that do not, or cannot, convert to natural gas.⁹²

86. The grant of the certificate to Southern Missouri Gas could severely affect the business of some propane dealers in the area.⁹³

87. Ed Simmons, a propane dealer and member of the MPGA, testified that it would never be in the economic interest of propane dealers to permit a natural gas company to enter an area with a propane market.⁹⁴

88. Southern Missouri Gas currently has an ACA balance between \$220,453 and \$378,470 that Staff has recommended be disallowed.⁹⁵

⁸⁵ Tr. pp. 173-74, 186-187.

⁸⁶ Tr. pp. 180-81, 184.

⁸⁷ Tr. p. 182.

⁸⁸ Tr. p. 61.

⁸⁹ Tr. p. 179.

⁹⁰ Tr. p. 206.

⁹¹ Tr. pp. 210-212.

⁹² Tr. pp. 210-212.

⁹³ Tr. p. 214, lines 16-25.

⁹⁴ Tr. p. 231.

⁹⁵ Ex. 11.

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Southern Missouri Gas has represented to the Commission that a disallowance of this scale would be detrimental to the Company's ability to continue to provide safe and adequate service throughout its Missouri service areas.⁹⁶

89. Southern Star is a wholesale gas transportation service supplier of Southern Missouri Gas.⁹⁷

90. Southern Missouri Gas proposes to provide natural gas distribution through a city gate delivery point from an interconnection point with the Southern Star pipeline (Station 142 near Rogersville).⁹⁸

91. Station 142 is the end of the Southern Star pipeline and the beginning of the Southern Missouri Gas system.⁹⁹

92. Southern Missouri Gas has already contracted for the necessary gas to serve Lebanon, Houston and Licking, plus a reserve margin of 20%.¹⁰⁰

93. Southern Missouri Gas has not experienced any pressure problems on its portion of the Southern Star pipeline.¹⁰¹

94. Exhibit 9 shows that the monthly pressure tests at Station 142 have shown constant results.¹⁰²

95. Mr. Simmons' testimony regarding pressure problems was not based on any personal knowledge and was based on other areas of the system not related to the current applications.¹⁰³

96. Southern Missouri Gas pledges to operate in accordance with the current safety rules of the Commission.¹⁰⁴

97. If the certificates are granted promptly, Southern Missouri Gas estimates that service will be available in Lebanon by December 2007 or January 2008.¹⁰⁵

98. Southern Missouri Gas expects to spend about \$11 million to build transmission lines to Lebanon, Houston and Licking, and another \$1.7 million to build distribution lines in those communities.¹⁰⁶

⁹⁶ Ex. 11; and Tr. p. 86.

⁹⁷ Tr. p. 63, line 12, to p. 64, line 4.

⁹⁸ Tr. p. 63, line 20.

⁹⁹ Tr. p. 161, lines 15-16.

¹⁰⁰ Tr. pp. 63-64.

¹⁰¹ Ex. 9; Tr. pp. 68-69.

¹⁰² Ex. 9; Tr. pp. 68-69.

¹⁰³ Tr. p. 209, and pp. 233-234.

¹⁰⁴ Tr. p. 64, lines 15-18.

¹⁰⁵ Tr. p. 112, lines 4-18.

¹⁰⁶ Tr. p. 120, lines 12-14, and p. 121, lines 24-25.

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99. Southern Missouri Gas anticipates adding approximately twelve additional employees to provide service to the communities of Lebanon, Houston, and Licking.¹⁰⁷

100. Southern Missouri Gas and the customers to be served would share the cost of providing service to a particular area or customer according to the provisions of Southern Missouri Gas's tariffs which are similar to other local distributor companies in Missouri.¹⁰⁸

101. Southern Missouri Gas would bear the total cost of laying a 2-inch distribution main along a street.¹⁰⁹

102. The cost of the service lines and meters would be shared by Southern Missouri Gas and the customer. Each meter costs \$300 to \$400.¹¹⁰

103. Southern Missouri Gas estimates that conversion from propane or electricity to natural gas will cost about \$1,500 per residential customer, including the cost of the main.

104. The gas service tariff of Southern Missouri Gas allows it to pay \$250 of the conversion cost per residential customer.

105. Southern Missouri Gas has a website which states, "If you want to convert your home from propane or electricity to natural gas, SMNG will run a gas line to your house, set a meter, and convert up to three (3) appliances at no charge to you."¹¹¹

106. In October 2005, Public Counsel filed a complaint before the Commission alleging that Southern Missouri Gas was not following Commission rules regarding hedging practices. That case was resolved by a stipulation and agreement.¹¹²

107. The applications for certificates to serve Lebanon, Houston, and Licking filed by Southern Missouri Gas include all the information necessary for a Commission determination.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

¹⁰⁷ Tr. p. 64, lines 13-14.

¹⁰⁸ Tr. pp. 305-307.

¹⁰⁹ Tr. p. 125, lines 7-12.

¹¹⁰ Tr. p. 125, lines 13-23.

¹¹¹ Ex. 14.

¹¹² Tr. pp. 145-146.

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Southern Missouri Gas is a “gas corporation” and a “public utility” under the jurisdiction of the Commission under Chapters 386 and 393, RSMo.¹¹³

The Commission has authority under Section 393.170, RSMo, to grant permission and approval for the “construction of a gas plant.” Section 392.170 states in part:

2. . . . Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities.

3. The commission shall have the power to grant permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service. The commission may by its order impose such condition or conditions as it may deem reasonable and necessary. Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void.

Section 393.170.3, set out above, authorizes this Commission to grant a certificate of convenience and necessity when it determines, after due hearing, that the proposed project is “necessary or convenient for the public service.” It has been held that the term “necessity” does not mean “essential” or “absolutely indispensable,” but rather that the proposed project “would be an improvement justifying its cost,”¹¹⁴ and that the

¹¹³ All statutory references are to the Revised Statutes of Missouri 2000 as supplemented by the Cumulative Supplement of 2006 unless otherwise noted.

¹¹⁴ St. ex rel. Intercon Gas, Inc. v. Public Service Commission, 848 S.W.2d 593, 597 (Mo. App., W.D. 1993); St. ex rel. Beaufort Transfer Co. v. Clark, 504 S.W.2d 216, 219 (Mo. App. 1973).

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inconvenience to the public occasioned by lack of the proposed service is great enough to amount to a necessity.¹¹⁵

It is within the Commission's discretion to determine when the evidence indicates the public interest would be served by the award of the certificate.¹¹⁶ However, the Commission may not grant a certificate of convenience and necessity unless the applicant has already obtained a local franchise, which is an "absolute prerequisite."¹¹⁷

The MPGA suggests that the standard the Commission must follow is set out by its previous cases. The standard governing this matter is actually set by statute as noted above. The Commission may grant a certificate of convenience and necessity if it determines, after hearing, that it is "necessary or convenient for the public service."¹¹⁸ The Commission has, however, previously set out criteria which it has used to evaluate natural gas certificate applications. Those criteria are: (1) a need for the service; (2) the applicant is qualified to provide the proposed service; (3) the applicant has the financial ability to provide the service; (4) the applicant's proposal is economically feasible; and (5) the service promotes the public interest.¹¹⁹

If the Commission grants the requested certificates to Southern Missouri Gas, the company will have an obligation to serve the public in its allotted service areas.¹²⁰ *Harline* provides as follows regarding a public utility's obligation to serve in its certificated service territory:

The certificate of convenience and necessity is a mandate to serve the area covered by it, because it is the utility's duty, within reasonable limitations, to serve all persons in an area it has undertaken to serve.¹²¹

If Houston or Licking exercise their options to purchase the local distribution system within the municipality, it may place Southern Missouri

¹¹⁵ *Beaufort Transfer Co.*, supra; *St. ex rel. Transport Delivery Service v. Burton*, 317 S.W.2d 661 (Mo. App. 1958).

¹¹⁶ *Intercon Gas*, supra, quoting *St. ex rel. Ozark Electric Coop. v. Public Service Commission*, 527 S.W.2d 390, 392 (Mo. App. 1975).

¹¹⁷ *St. ex inf. Shartel ex rel. City of Sikeston v. Missouri Utilities Co.*, 331 Mo. 337, 350, 53 S.W.2d 394, 399 (Mo. banc 1932).

¹¹⁸ Section 393.170.3, RSMo.

¹¹⁹ *Re Intercon Gas, Inc.*, 30 Mo P.S.C. (N.S.) 554, 561 (1991).

¹²⁰ *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177, 181 (Mo. App. 1960).

¹²¹ *State ex rel. Ozark Power & Water Co. v. Public Service Commission*, 287 Mo. 522, 229 S.W. 782; *State ex rel. Kansas City Power & Light Co. v. Public Service Commission of Missouri et al.*, 335 Mo. 1248, 76 S.W.2d 343; *State ex rel. Federal Reserve Bank of Kansas City v. Public Service Commission*, 239 Soap. 531, 191 S.W.2d 307; and *May Department Stores Co. v. Union Electric Light & Power Co.*, 341 Mo. 299, 107 S.W.2d 41.

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Gas in violation of the order in Commission Case No. GA-94-127, in which the Commission stated “that Tartan [the predecessor of Southern Missouri Gas and of Southern Missouri Natural Gas] provide only retail natural gas service to the ten municipalities from which it has received franchises . . .” [Commission Report and Order, Case No. GA-94-127, p. 9].¹²² Thus, to remain in compliance with Commission orders, it would be necessary for the company to seek a waiver from that provision.

Southern Missouri Gas and its customers share the cost of providing service to a particular area or specific customer according to the provisions of the tariffs of Southern Missouri Gas.¹²³ Those tariffs are similar to the tariffs of other local distributor companies in Missouri.¹²⁴

Commission Rule 4 CSR 240-3.205 requires a gas company applying for a certificate of convenience and necessity to include in its application, a “plat drawn to scale of one-half inch (1/2”) to the mile on maps comparable to county highway maps issued by the Missouri Department of Transportation or a plat drawn to a scale of two thousand feet (2,000’) to the inch.” Even though the maps included with the application were not similar to the county maps referenced in the rule, they were sufficient to determine the proposed service area which is the purpose for the rule. In addition, given that the metes and bounds descriptions are included, there can be no mistake as to the service area. Finally, no harm or prejudice was alleged to have come to any of the parties because of the quality of the maps submitted, and therefore, the Commission concludes that the maps attached to the application are in compliance with the Commission’s rule.

Decision

The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision. After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decision.

The evidence adduced shows that the proposed expansion of the natural gas service territory of Southern Missouri Gas into Lebanon, Houston and Licking is economically feasible, will meet a definite need in those communities, and will confer tangible economic benefits upon them.

¹²² Tr. p. 248, lines 15-21.

¹²³ Tr. pp. 305-307.

¹²⁴ Tr. pp. 305-307.

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There is a need for the service. This need is evidenced by the fact that the cities have consistently each granted Southern Missouri Gas a franchise, and with regard to Lebanon, a vast majority of the voters have approved that franchise. The communities are in the best position to assess whether there is a need or desire for natural gas service, and from the actions of those communities it is obvious that such a need exists. In addition, Joe Knapp, the City Administrator for the City of Lebanon, testified that the City of Lebanon had been losing economic development opportunities because of the lack of natural gas service in the area. Mr. Knapp also testified that current industries have been requesting natural gas service.

Southern Missouri Gas also showed that the grant of the certificates would bring benefits in the form of choice of an economical method of energy. In addition, the added volume to the system as a whole could benefit all the customers on the system.

One of the possible detriments of granting the certificate is the risk of failure being placed on the current ratepayers in the system. The evidence also shows that the expansion may severely affect the business of propane dealers in those communities and may have an adverse effect on propane prices in those communities. On balance, however, the benefits that the expansion will confer will outweigh those detriments. The Commission therefore concludes that the grant of the proposed certificates of convenience and necessity is necessary and convenient for the public interest.

The Commission further determines that if acceptable financing can be obtained without excessive risk to the current ratepayers, the grant of certificates is in the public interest. Thus, the Commission determines it is reasonable and necessary to place certain conditions on the grant of the requested certificate. As proposed by Staff and Public Counsel, the certificates of convenience and necessity will be conditioned on Southern Missouri Gas obtaining financing which is approved by the Commission, and on the shareholders, rather than the ratepayers, being deemed responsible for the detrimental effects of a loss resulting from inaccurate estimations of customer conversion or usage rates. Finally, Southern Missouri Gas is notified that if a city elects to purchase the system, a waiver from the previous Commission order may be required.

IT IS ORDERED THAT:

1. The applications for a certificate of convenience and necessity filed by Southern Missouri Gas Company, L.P., d/b/a Southern Missouri

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Natural Gas, on December 6, 2006, and February 7, 2007, are hereby granted with the conditions set out below.

2. Southern Missouri Gas Company, L.P., d/b/a Southern Missouri Natural Gas, is granted a certificate of public convenience and necessity to expand its backbone pipeline system and to construct, install, own, operate, control, manage, a gas distribution system for the public, as proposed in its applications, in the Cities of Lebanon, Licking, and Houston, Missouri, as an expansion of its presently certificated area, as conditioned herein.

3. The certificates granted in Ordered Paragraphs No. 1 and 2, above, are conditioned upon the Company's obtaining financing acceptable to the Commission.

4. The certificates granted in Ordered Paragraphs No. 1 and 2, above, are conditioned upon the shareholders assuming responsibility for any loss associated with inaccurate estimations of the customer conversion rate or of customer usage rates.

5. The Commission makes no finding as to the prudence or ratemaking treatment to be given any costs or expenses incurred as the result of the granting of this certificate of convenience and necessity, and reserves the right to make any disposition of costs and expenses which it deems reasonable, in any future ratemaking proceeding.

6. This Report and Order shall become effective on August 26, 2007.

Davis, Chm., Murray, Gaw, and
Appling, CC., concur;
Clayton, C., dissents; a separate
dissenting opinion may follow;
and certify compliance with
Section 536.080, RSMo 2000.

NOTE: At the time of publication, no dissenting opinions have been issued.

In the Matter of the Bona Fide Request of Big River Telephone Company, LLC for Interconnection, Services and Network Elements from BPS Telephone Company pursuant to 47 U.S.C 251(f)(1)

*Case No. TO-2008-0003
Decided: August 21, 2007*

Telecommunications §36. The Commission ordered that BPS Telephone Company shall not assert an exemption under 47 U.S.C. 251(f) with respect to a request for an interconnection

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agreement by Big River Telephone Company, LLC and also, the Order would not preclude BPS Telephone Company from asserting an exemption under the aforementioned statute with respect to any other telecommunications company's request for an interconnection agreement.

ORDER APPROVING STIPULATION AND CLOSING CASE

On August 15, 2007, Big River Telephone Company, LLC, BPS Telephone Company, the Office of the Public Counsel, and the Staff of the Missouri Public Service Commission filed a Unanimous Stipulation. The Stipulation purports to settle all issues in this matter. The parties request that the Commission accept their Stipulation as a resolution of this case.

The parties have agreed as follows:

a. The Commission should promptly issue its order resolving this case by approving this Unanimous Stipulation. The Commission's order should have an effective date of September 1, 2007.

b. If the Commission approves this Unanimous Stipulation, BPS agrees not to assert or rely on any and all exemptions under 47 USC 251(f) with respect to Big River's request for an interconnection agreement; provided, however, that nothing in this Unanimous Stipulation, or in the Commission's order approving it, shall prohibit BPS from asserting its rural telephone company exemption under 47 USC 251(f)(1)(A) with respect to any request for interconnection that BPS receives from any telecommunications services provider other than Big River.

c. If the Commission approves this Unanimous Stipulation, Big River agrees to withdraw the request for interconnection that it submitted to BPS on or about June 22, 2007. On or after September 1, 2007, Big River may submit to BPS a letter requesting the commencement of negotiations pursuant to 47 USC 252 for purposes of establishing a starting date for proceedings under 47 USC 252(b). Upon submittal of such letter, Big River and BPS agree to negotiate in good faith regarding the terms and conditions of an interconnection agreement between them. Assuming Big River submits its letter on September 1, 2007, and in the event Big River and BPS are not able to resolve all issues concerning an interconnection agreement by negotiation, either of them would be able to file a petition for arbitration with the Commission under 47

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USC 252(b) from January 14, 2008 to February 8, 2008. For purposes of meeting its obligation under 47 USC 251(f) to establish an implementation schedule, by approving this Unanimous Stipulation the Commission shall be deemed to have directed the parties to meet as needed during the 135 days following submittal of a letter requesting the commencement of negotiations by Big River and to negotiate in good faith during such period (and after, as needed) in compliance with applicable law.

d. All parties agree that all pending and unanswered (partially or wholly) discovery requests shall be deemed withdrawn to the extent unanswered as of the date of submission of this Unanimous Stipulation. For purposes of efficiency, the parties agree that discovery responses submitted in this matter may be used during the negotiations between Big River and BPS and during any subsequent arbitration, subject to continuing protection of proprietary and highly confidential information in accordance with the Commission's rules and orders. Certificates of compliance submitted herein pursuant to 4 CSR 240-2.135 shall be sufficient for the time being, but in the event an arbitration is commenced such certificates shall be re-filed in the new proceeding.

e. As indicated, the procedural schedule in this matter should be immediately suspended. In the event the Commission rejects this Unanimous Stipulation in whole or in part, including by issuing an order that does not fully comport with the terms and conditions hereof, the parties agree that the Commission should immediately set a prehearing conference to develop a new case schedule. The parties shall be free to fully litigate the issues in this matter pursuant to such new schedule without prejudice related to this Unanimous Stipulation and the parties shall retain all procedural and due process rights as fully as though this Unanimous Stipulation had not been presented for approval, and any suggestions, memoranda, testimony, or exhibits that have been offered or received in support of this Unanimous Stipulation shall become privileged as reflecting the substantive content of settlement discussions and shall be stricken from and not be considered as part of

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the administrative or evidentiary record before the Commission for any purpose whatsoever. All discovery requests deemed withdrawn pursuant to the terms hereof shall be deemed newly submitted (i.e. responses due 20 days thereafter) as of the date of the Commission's rejection order. Further, the parties agree that under such circumstances the deadline for action under 47 USC 251(f)(1) shall be deemed extended from October 30, 2007 to the date that is 90 days after the issuance of such rejection order. In the event the Commission does not issue its order either approving and implementing, or rejecting, this Unanimous Stipulation by September 1, 2007, it shall be deemed on that date to have issued an order rejecting the Unanimous Stipulation and any party may file a motion seeking a prehearing conference date to develop a new case schedule in accordance with the foregoing terms and conditions.

f. Solely for purposes of issuing an order that comports herewith, the parties agree that Big River's Notice of Bona Fide Request and this Unanimous Stipulation shall be deemed received into evidence.

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties as a resolution of issues raised in this case.¹ In reviewing the agreement, the Commission notes that²

Every decision and order in a contested case shall be in writing, and, except in default cases, or cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law. * * *

Consequently, the Commission need not make either findings of fact or conclusions of law in this order.

The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the

¹Section 536.060, RSMo Cum. Supp. 2006.

²Section 536.090, RSMo Cum. Supp. 2006. This provision applies to the Public Service Commission. *State ex rel. Midwest Gas Users' Association v. Public Service Commission of the State of Missouri*, 976 S.W.2d 485, 496 (Mo. App., W.D. 1998).

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opportunity to present evidence.³ Since no one has requested a hearing in this case, the Commission may grant the relief requested based on the Stipulation.

The Commission finds that the parties have reached a just and reasonable settlement in this case. Accordingly, the Commission will direct the parties to abide by the terms of the Stipulation. Therefore, the Commission finds that BPS shall not assert or rely on any exemption under 47 U.S.C. 251(f) with respect to a request from Big River for an interconnection agreement. This finding shall not prohibit BPS from asserting an exemption under 47 U.S.C. 251(f)(1)(A) with respect to any request for interconnection BPS receives from any telecommunications services provider other than Big River.

The Commission therefore sets out an implementation schedule by directing Big River and BPS to negotiate interconnection in good faith during the 135 days following the submission of a letter requesting such negotiations by Big River to BPS. If Big River and BPS are unable to reach a negotiated interconnection agreement and arbitration is desired, Big River and BPS are directed to proceed under the statutory timeframes for arbitration as set out in 47 U.S.C. 252.

IT IS ORDERED THAT:

1. The Unanimous Stipulation filed on August 15, 2007, is hereby approved as a resolution of all issues in this case.
2. The parties to this case are ordered to comply with the terms of the Unanimous Stipulation.
3. BPS Telephone Company shall not assert an exemption under 47 U.S.C. 251(f) with respect to a request for an interconnection agreement by Big River Telephone Company, LLC.
4. Nothing in this order shall prohibit BPS Telephone Company from asserting an exemption under 47 U.S.C. 251(f) with respect to any other telecommunications company's request for an interconnection agreement.
5. Big River Telephone Company, LLC, and BPS Telephone Company shall proceed under the implementation schedule for its negotiations as set out above.

³ State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission, 776 S.W.2d 494, 496 (Mo. App. 1989).

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6. This order shall become effective on September 1, 2007.
7. This case shall close on September 2, 2007.

Nancy Dippell, Deputy Chief Regulatory
Law Judge, by delegation of authority
pursuant to Section 386.240, RSMo 2000

NOTE: The Stipulation and Agreement referenced in this order has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In The Matter of the Application of Aquila, Inc. for Permission and Approval and a Certificate of Public Convenience and Necessity Authorizing it to Acquire, Construct, Install, Own, Operate, Maintain, and Otherwise Control and Manage Electrical Distribution Substation and Related Facilities in Benton County, Missouri (Near the City Of Cole Camp)

Case No. EA-2007-0245
Decided: August 28, 2007

Electric §3. The Commission ordered that Aquila, Inc.'s Application be dismissed due in fact to the Commission having previously granted Aquila all the authority it needs to construct a substation in Benton County branching from a Certificate of Convenience and Necessity granted in a Report and Order, issued on January 18, 1938 (Case No. 9470).

ORDER DISMISSING APPLICATION

On December 28, 2006, Aquila, Inc. filed with the Missouri Public Service Commission an application for permission and approval, and a certificate of public convenience and necessity authorizing Aquila to acquire, construct, install, own, operate, maintain, and otherwise control and manage an electrical transmission substation and related facilities located within Benton County, Missouri. In addition to the application, Aquila filed a Motion for Expedited Treatment.

On December 29, 2006, the Commission issued an Order Directing Notice, Setting Date for Intervention, and Directing Filing. Any responses to the Motion for Expedited Treatment were to be filed no later than January 8, 2007. Any party wishing to intervene was directed to do so no later than January 10, 2007. No responses to Aquila's Motion for Expedited Treatment or requests for intervention were filed.

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On January 4, 2007, Aquila filed a First Amended Application by Interlineation.

In 1937, Aquila's predecessor in interest, Missouri Public Service Corporation, sought an order from the Commission granting it a Certificate of Convenience and Necessity ("Certificate") to construct, maintain and operate, as a public utility, electric transmission and distribution lines for the purpose of furnishing electric service in several counties, including Benton County. The Report and Order, issued on January 18, 1938 in Case No. 9470, notes that the Applicant sought the Certificate "because of the increasing demand for electric service it is required continuously to extend and expand its transmission and distribution, in that under the procedure it has heretofore followed under the laws of Missouri, it has made an application for each extension, regardless of size, to serve new customers. ... It claims that in some instances the cost of securing the certificate of convenience and necessity has amounted to more than the actual cost of constructing the physical property. By this case it hopes to eliminate that added cost, as well as expedite its procedure in arranging to take care of requests for service."

It is clear from the Report and Order that the single application and Certificate were intended to relieve the utility from filing with the Commission for specific extensions to transmission and distribution facilities, in that the utility would be granted blanket authority to extend, maintain and upgrade those distribution and transmission facilities in the service territory set out in the application, which included Benton County. The Commission's Report and Order granted the authority "to construct, maintain and operate electric transmission lines and distribution systems" in Benton County, exclusive of incorporated areas of municipalities until the municipality gave its permission. The Report and Order established other conditions, which are not relevant to the present application. The Report and Order has not been vacated or superseded and remains in effect.

The substation that Aquila seeks to build constitutes a part of its transmission lines and distribution systems. A substation is "facility equipment that switches, changes or regulates voltage."¹ The regulation of voltage as electricity is transported from the generation facility to the end user's location is crucial to the safe and efficient delivery of that electricity to a customer.

¹ *Electric Power Industry*; Warkentin, Denise; (1998) at 191.

Although transmission and distribution are technically different parts of a transmission and distribution system, the transmission side cannot be separated from the distribution side.² As Ms. Warkentin explains,

Transmission and distribution systems are responsible for receiving, transmitting, and then distributing electric power from the power plant [reference omitted]. Unit transformers increase the voltage to transmission level before the electricity passes through a switchyard [reference omitted] and is finally directed to transmission lines. Transmission lines carry high-voltage electricity to substations where the voltage is lowered to levels that can be handled by distribution lines. [...] Distribution lines... carry power to consumer areas [and] deliver power to customers.³

The company requested and received authority for both transmission lines and distribution systems from the Commission. On page 6 of the Commission's January 18, 1938 Report and Order, the Commission noted that it had attached a certified copy of the order of the county court of Benton County that had "granted the applicant electric transmission and distribution lines along and across the highways of the ... count[y]." As one cannot have both transmission and distribution lines in a county without a substation, it is reasonably inferred that the grant of authority from the county included the authority to construct such substations as are necessary to deliver safe and adequate service to customers in Benton County. The Commission did so in its Order, in which it granted authority to construct transmission lines and distribution "systems," which clearly includes substations.

As the Commission has already granted to Aquila all the authority it needs to construct a substation in Benton County, its present application will be dismissed.

IT IS ORDERED THAT:

1. Aquila, Inc.'s Application is dismissed.

² Id at 21.

³ Id at 21, 22.

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2. This order shall become effective on September 7, 2007.
3. This case may be closed on September 8, 2007.

Davis, Chm., Murray, Appling, CC., concur;
Gaw, Clayton, CC., dissent.

Dale, Chief Regulatory Law Judge

**The Staff of the Missouri Public Service Commission, Complainant, v.
Missouri Pipeline Company, LLC, and Missouri Gas Company, LLC,
Respondents***

*Case No. GC-2006-0491
Decided: August 28, 2007*

Gas §36. The Commission found that Staff had proved the allegations contained in Count III of its complaint, in which Missouri Pipeline Company and Missouri Gas Company offered certain transportation discounts to Omega, at a time when Omega was an affiliated company. As a result of this finding the Commission has ordered that by the terms of their tariffs, the rates MPC and MGC charged to an affiliated shipper became the maximum rate that could be charged to a non-affiliated shipper on June 21, 2006.

REPORT AND ORDER

APPEARANCES

Lera L. Shemwell, Deputy General Counsel, and **Steven C. Reed**, Litigation Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

Paul S. DeFord, Lathrop and Gage, L.C., 2345 Grand Boulevard, Suite 2800, Kansas City, Missouri 64108, and **Aimee D.G. Davenport**, Lathrop and Gage, L.C., 314 E. High Street, Jefferson City, Missouri 65101, for Missouri Pipeline Company, LLC, and Missouri Gas Company, LLC.

David L. Woodsmall, Finnegan, Conrad & Peterson, L.C., 428 East Capitol Avenue, Suite 300, Jefferson City, Missouri 65102-0148, for the Municipal Gas Commission of Missouri.

Marc D. Poston, Senior Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel.

*This case was appealed to the Missouri Court of Appeals (WD) and affirmed. See 307 S.W. 3d 162 (Mo. App. W.D. 2009)

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Colly J. Durley, Smith Lewis, LLP, 111 South Ninth Street, Suite 200, Columbia, Missouri 65205-0918, for Union Electric Company d/b/a AmerenUE.

REGULATORY LAW JUDGE: Morris L. Woodruff, Deputy Chief Regulatory Law Judge

Syllabus: The Commission finds that Staff proved Counts I, III, and IV of its complaint against Missouri Pipeline Company and Missouri Gas Company. The Commission finds that Staff did not prove Counts II and V of its complaint.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Procedural History

On June 21, 2006, the Staff of the Commission filed a complaint against Missouri Pipeline Company, LLC (MPC), and Missouri Gas Company, LLC (MGC). The complaint contains six counts alleging that MPC and MGC have violated several aspects of their tariffs. Staff developed this case as an offshoot from a broader over-earnings complaint Staff filed against MPC and MGC, as well as several affiliated companies, on March 31, 2006. That over-earnings complaint was pending before the Commission as Case No. GC-2006-0378, but, at the request of Staff, was dismissed without prejudice on June 25, 2007.

By a notice issued on June 22, 2006, pursuant to Commission Rule 4 CSR 240-2.070(7), the Commission served a copy of Staff's complaint on MPC and MGC. That order also provided notice of the filing of Staff's complaint to the other parties to GC-2006-0378, and established an intervention deadline of July 12, 2006. Subsequently, Union Electric Company, d/b/a AmerenUE, and the Municipal Gas Commission of Missouri were allowed to intervene. MPC and MGC timely responded to Staff's complaint by filing their answer on July 21, 2006.

The Commission established a procedural schedule requiring the parties to prefile written direct, rebuttal, and surrebuttal testimony. An

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evidentiary hearing convened on December 13, and continued on December 14 and 15, 2006. Initial post-hearing briefs were submitted on February 9, 2007, with reply briefs following on February 20. Additional oral arguments were held on July 10, 2007.

The Operations of MPC and MGC

MPC and MGC own and operate interconnected, intrastate natural gas pipeline systems located in east central Missouri. The natural gas flowing through MPC's pipeline is obtained from two interconnections with interstate pipelines. The first interconnection is with Panhandle Eastern Pipeline Company in Pike County, Missouri. The MPC pipeline then runs south and east into St. Charles County, Missouri, where it terminates with a connection to Missouri Interstate Gas. Missouri Interstate Gas, in turn, owns and operates a 5.6-mile pipeline that runs under the Mississippi River and interconnects with a major interstate natural gas pipeline, Mississippi River Transmission, in Illinois. A branch of MPC's pipeline extends southwesterly from St. Charles County, through Franklin County, to a southern terminus at Sullivan, Missouri.

At Sullivan, the MPC pipeline connects with the pipeline owned and operated by MGC. The MGC pipeline then extends another 66 miles, terminating at the United States Army facility, Fort Leonard Wood. Along the way, MGC's pipeline also provides gas to the towns of St. James, Cuba, Waynesville, St. Robert, Rolla, Salem, and Owensville.¹

MPC and MGC are transporters of gas, not sellers of gas. That means they collect a fee for transporting the gas that various shippers purchase from gas suppliers and move through the pipelines. Shippers on the pipeline include other public utilities, notably Laclede Gas Company and AmerenUE, who move gas through the pipelines for delivery to the homes and businesses of their customers. Other shippers are municipal gas distribution systems and large industrial users who purchase their own gas supply.

The Operations of Omega Pipeline Company

The third pipeline company that is important to Staff's complaint is Omega Pipeline Company. Omega owns and operates the natural gas distribution system on Fort Leonard Wood, a federal enclave. In its role as a local distribution company, operating exclusively at Fort Leonard Wood, Omega is not subject to regulation by this Commission.² However, after July 1, 2003, Omega was also used as a gas marketing company, providing

¹ Ries Rebuttal, Ex. 304, Pages 4-5.

² The Federal government has exclusive jurisdiction over federal enclaves pursuant to Article I, Section 8 of the United States Constitution.

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gas-marketing services³ to several entities that obtained natural gas through MPC or MGC. Omega's role as a gas marketer is the role about which Staff is concerned in its complaint.

Ownership of MPC, MGC, Omega, and Affiliated Companies

MPC and MGC, as well as Missouri Interstate Gas, are owned by United Pipeline Systems, Inc., which was formerly known as Utilicorp Pipeline Systems, Inc. United Pipeline is owned by Gateway Pipeline Company, LLC, which purchased the stock of Utilicorp Pipeline Systems in 2002, from the company now known as Aquila, Inc.⁴ Moving up the corporate ownership chain, Gateway is ultimately owned by two individuals, Dennis Langley (85%) and David Ries (15%).⁵ As sister corporations sharing a common ownership, MPC and MGC are "affiliated entities", as that term is defined by the Commission's affiliate transaction rule.⁶ Along with MPC and MGC, Gateway also purchased Omega Pipeline Company from Aquila in 2002. Thus, until it was sold to Tortoise Capital Resources Corporation on June 1, 2006, Omega was also an affiliate of MPC and MGC.

Staff's Motion for Sanctions for Destruction of Documents

On November 14, 2006, Staff filed a motion asking the Commission to impose monetary sanctions against MPC, MGC, and their President, David Ries, for allegedly destroying certain invoices that Staff needs to support its case. In addition, Staff asked the Commission to apply the spoliation of evidence rule to make certain evidentiary inferences adverse to MPC and MGC. On December 5, after several rounds of written responses were submitted by MPC and MGC, as well as by Staff, the Commission informed the parties that it would take up Staff's motion as a part of the evidentiary hearing. The Commission also informed the parties that they would be allowed to present additional live direct testimony on that question. Much of the first day of the hearing was spent hearing testimony on Staff's motion.

In January 2006, early in its investigation, Staff sought production of invoices showing the bills that MPC and MGC sent to their customers.⁷ At that time, David Ries informed Staff that those actual invoices were not

³ Gas marketing services include purchase of gas supplies, administration of contracts, and monitoring of the nomination process required to transport gas,

⁴ Id.

⁵ Schallenberg Direct, Ex. 19, Schedule 3, Page 4.

⁶ Commission Rule 4 CSR 240-40.015(1)(A).

⁷ A copy of Staff's subpoena to B. J. Lodholz, CFO/Comptroller for MPC and MGC is Ex. 251.

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retained in the companies' records.⁸ Ries indicated that the original paper invoices were mailed to the customers and the companies did not retain a copy for their own records.⁹ Instead, of invoices, Ries provided Staff with a revenue summary document for 2005.¹⁰ That summary spreadsheet does not reveal the existence of additional customers being served through pipeline capacity held by the City of Cuba.¹¹ Subsequently, in June 2006, Staff obtained what it described as recreated invoices for 2004 and 2005 from MPC and MGC. Staff has never obtained 2003 invoices from MPC and MGC.¹² Ries testified in his deposition that the companies did not provide the 2003 invoices to Staff because "[w]e don't have any paper copies of them and it would require an extreme amount of effort and diligence to go back and recreate them."¹³

Since it could not obtain actual invoices from MPC and MGC, Staff contacted various customers, attempting to obtain copies of the invoices the customers received from MPC and MGC. Actual invoices received from Cuba revealed that some of the gas that MPC and MGC showed as delivered to Cuba was actually being delivered to other customers.¹⁴

Because of these inconsistencies, Staff suspected the accuracy of the recreated invoices, but continued to rely on the recreated invoices in developing its complaint. Then, on July 17, 2006, Staff deposed B. J. Lodholz, the former CFO/Controller of MPC and MGC. Lodholz revealed that he kept paper copies of the "summary sheet, the front page" of the invoices in his office. Lodholz indicated that he had kept those summary sheets all the way back to when he started working for MPC and MGC in July 2002.¹⁵

Believing they had now found the original invoices they were seeking, Staff directed Ries to bring those documents from Lodholz's files to his October 17, 2006, deposition. At his deposition, Ries produced actual copies of the face sheets from the invoices,¹⁶ but indicated that the complete documents that Staff sought were not in Lodholz's files. Ries also

⁸ Transcript, Pages 50-51, Lines 21-25, 1-12.

⁹ Transcript, Page 146, Lines 8-16.

¹⁰ That spreadsheet is Ex. 53HC.

¹¹ Transcript, Pages 70-71, Lines 19-25, 1-8.

¹² Transcript, Page 91, Lines 20-22.

¹³ This portion of Ries' deposition is Ex. 257, Page 700, Lines 23-25. The deposition was also read into the record at the hearing and may be found at Transcript, Page 106, Lines 1-3.

¹⁴ Transcript, Page 57, Lines 12-23.

¹⁵ This portion of Lodholz' deposition is Ex. 256, Page 191, Lines 3-20. It was read into the record at the hearing and may be found at Transcript, Pages 95-96, Lines 10-25, 1.

¹⁶ Transcript, Page 104, Lines 23-24.

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suggested that perhaps the person who replaced Lodholz as controller had discarded the documents when he took over Lodholz's office.¹⁷ Lodholz had left the employ of MPC and MGC on May 12, 2006.¹⁸

In its motion for sanctions, Staff accused Ries, or someone acting at his direction, of having deliberately destroyed the original invoices from 2003, 2004, and 2005. In response to Staff's motion for sanctions, MPC and MGC filed affidavits from Ries, Michael Mertz (Controller), David Wallen (V.P. Operations), and Patty Hawkins (Office Manager). All the affidavits indicated that the documents described by Lodholz in his deposition were only billing summaries, not the complete invoices sought by Staff. Each affiant also denied having destroyed any of Lodholz's documents after Lodholz left the company on May 12, 2006.¹⁹

At the hearing, MPC and MGC introduced an affidavit from Lodholz, which was admitted into evidence over the objection of Staff.²⁰ In his affidavit, Lodholz explained that the documents he referred to in his deposition were not the front page of the actual invoices. Instead, he had retained "a one page summary sheet for each month showing a list of the pipeline customers, the volume of gas delivered, the dollar charge by each of MPC and MGC, as well as the total aggregate charge to each customer for that month."²¹ The summary sheets described by Lodholz are included with the affidavit as Exhibit 311. No party called Lodholz to testify at the hearing.

Based on the evidence presented, Staff failed to prove its allegations that documents retained by Lodholz were destroyed to avoid disclosing them to Staff. It appears that the documents described by Lodholz in his deposition, as clarified in his affidavit, were turned over to Staff. No monetary sanction for destruction of documents is appropriate. However, the adverse evidentiary inference sought by Staff requires scrutiny.

¹⁷ Transcript, Page 107, Lines 3-14.

¹⁸ Transcript, Page 109, Lines 2-3.

¹⁹ The four affidavits are Ex. 258.

²⁰ The Lodholz affidavit is Ex. 311. One of Staff's objections to the admission of the Lodholz affidavit was that the affidavit did not include a date indicating when it was executed. Approximately a month after the hearing, on January 16, 2007, MPC and MGC filed a re-executed affidavit from Lodholz that indicates it was signed on January 12, 2007. MPC and MGC filed an accompanying motion asking the Commission to substitute the re-executed affidavit for the originally admitted Exhibit 311. Staff opposed that motion. There is no basis for supplementing or substituting a new affidavit for the document previously admitted as Exhibit 311. MPC and MGC's motion will be denied.

²¹ Ex. 311.

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The Commission is troubled by MPC and MGC's failure to provide Staff with even recreated invoices for 2003. Section 393.140(4), RSMo 2000, and Commission Rule 4 CSR 240-10.010 require public utilities to maintain their vital records and to make those records available to the Commission for review. However, MPC and MGC claim that to provide Staff with copies of invoices sent to customers in 2003 would be unduly burdensome. This is not a question of retaining documents in electronic form rather than paper. It is certainly reasonable to dispose of paper and instead keep important documents in an electronic database. That is how the Commission retains its own files. However, it is unbelievable that MPC and MGC would produce invoices, mail those invoices to customers, and then fail to retain either a paper or electronic copy of such invoices in a readily accessible form.

Staff did not prove that MPC and MGC deliberately destroyed those invoices, although that possibility is consistent with the circumstances. Staff certainly established that MPC and MGC's inability to produce original or electronic copies of customer invoices was very unusual.²² Furthermore, Staff established that it had great difficulty obtaining needed documentation from MPC and MGC throughout its investigation.²³

While Staff did not prove that the invoices were deliberately destroyed, the circumstances do establish that MPC and MGC were at least grossly incompetent in their retention of important records. Because of MPC and MGC's failure to maintain proper records for 2003, Staff was denied the evidence it needs to firmly establish the transportation rates charged to shippers on MPC and MGC's pipelines in 2003. The Commission will allow Staff to infer those rates, consistent with other evidence presented, as explained later in this Report and Order.

Regulation by the FERC

On June 28, 2006, Missouri Interstate Gas, along with MPC and MGC filed an application with the Federal Energy Regulatory Commission for authority to reorganize themselves to be reconstituted as an interstate pipeline, subject to the exclusive jurisdiction of the FERC. On April 20, 2007, the FERC issued an order granting that application and issuing federal certificates to the reorganized interstate pipeline.²⁴ Staff and other parties have sought rehearing of the FERC's decision, but, if the FERC's order stands, MPC and MGC will no longer be subject to regulation by this Commission.

²² Transcript, Page 62, Lines 15-18.

²³ Transcript, Pages 125-126, Lines 20-25, 1-5.

²⁴ FERC Docket No. CP06-407-000, et. al.

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However, this case is not moot because Staff's complaint alleges MPC and MGC violated their tariffs at a time when those companies were undeniably subject to regulation by this Commission. Therefore, the Commission will render a decision on Staff's complaint.

The Allegations of Staff's Complaint

Count 1

Findings of Fact

The first count of Staff's Complaint alleges that MPC and MGC failed to maintain separate facilities and personnel from Omega, as a marketing entity, thereby violating their own tariffs. In doing so MPC and MGC also failed to abide by the Commission's regulation regarding affiliate transactions.

David Ries is president of MPC and MGC. In addition, he was president of Omega until it was sold on June 1, 2006.²⁵ Staff alleges Ries used his position as the head of these companies to negotiate arrangements between the companies in a way that favored Omega over other companies that were shipping gas on the MPC and MGC pipelines. Staff alleges that, acting through Ries, MPC and MGC failed to apply their tariff terms, conditions, and requirements in a uniform and non-discriminatory manner to non-affiliated shippers. In particular, Staff alleges that MPC and MGC improperly shared confidential information with Omega, failed to require Omega to balance its gas shipments on the pipelines, while requiring all other shippers to do so, and allowed Omega to take possession of and sell lost and unaccounted for gas that accumulated on the pipeline.

The tariffs of MPC and MGC provide that MPC and MGC share office space with its affiliates, which would include Omega. However, those tariffs also indicate that MPC and MGC, as transporters of gas, maintain "separate operational facilities and personnel" from their affiliates. The tariffs also promise that "operational and accounting information is confidentially maintained by Transporter."²⁶

The evidence demonstrates that, as president of MPC, MGC, and Omega, Ries was given daily access to information that could benefit Omega in its role as a marketing agent. Staff submitted a sample of the daily reports Ries received as Exhibit 21. As described by Staff's witness, Robert Schallenberg, that daily report contains:

²⁵ Transcript, Page 509, Lines 3-14.

²⁶ Ex. 70, MGC's tariff, P.S.C. Mo. No. 2, Sheet No. 39; and Ex. 71, MPC's tariff, P.S.C. Mo. No. 3, Sheet 39.

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information regarding the shippers, all the shippers on the pipeline. It identifies their agent or when they're acting as their own agent. It identifies their contract number to the extent this is one for its shipments. And then it tells you what its current status is regarding the gas that's brought into the system on the day and the in balance [imbalance]. And then it shows cumulative information.²⁷

That same information was not shared with other shippers on the pipelines, including other entities that were acting as marketing agents in competition with Omega.²⁸ Having access to that sort of information provided Omega with a competitive advantage over the other marketing agents who shipped gas on MPC and MGC allowing Omega access to market information and price information of competitors, other shippers could not access.²⁹ In a game of cards it would be like one player being able to see the cards of others at the table.

MPC and MGC do not deny that as president of Omega, Mr. Ries had access to the same information about the operations of the pipelines that he could access as president of MPC and MGC. Instead, in their defense, MPC and MGC argue that the Commission's Staff has long been aware of the affiliate relationship and shared employees and officers between Omega and MPC and MGC, and did not raise any objection to that relationship until it filed this complaint.

MPC and MGC explain that they wanted to provide a bundled service to some small customers of the pipelines and were looking for a way to do that consistent with their tariffs.³⁰ However, those tariffs do not allow them to buy or sell gas; they are only allowed to operate as transporters of gas. On August 23, 2002, Ries contacted Staff by e-mail and indicated MPC and MGC were considering either the revision of its tariffs to allow for the sale of gas to customers, or as an alternative, the use of Omega to provide a marketing service to customers along the path of the pipelines.³¹ Staff responded to Ries' proposals in a letter dated January 3, 2003.³²

²⁷ Transcript, Page 293, Lines 13-20.

²⁸ Transcript, Page 265, lines 1-3.

²⁹ Transcript, Page 278, Lines 10-20.

³⁰ Transcript, Page 574, Lines 2-19.

³¹ Ex. 310.

³² Ex. 308.

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MPC and MGC contend that Staff's letter indicates Staff knew of and approved the plan to use Omega as a marketing affiliate.³³ In particular, MPC and MGC point to one sentence of that letter that states, "In previous conversations, Staff has expressed concern over the structure of these transactions and Staff's preference that an affiliate should make any 'bundling' arrangements."³⁴ From that sentence, MPC and MGC contend Staff knew of and approved their plan to use Omega to market gas.

That interpretation is not, however, supported by the rest of the Staff's letter. The next sentence of the letter states:

Even if an affiliate engages in these transactions, however, Staff has concerns that separation between regulated and unregulated operations will not exist due to the structure of MPC, MGC, MIG, and Omega.

Clearly, in 2003, Staff had concerns about the improper sharing of information between MPC and MGC and a marketing affiliate. It is precisely those concerns that Staff brought to the Commission's attention in this complaint. Thus, the January 3, 2003, letter cannot reasonably be interpreted as indicating Staff's approval of the use of Omega as a marketing affiliate of MPC and MGC.

Even if Staff had fully approved MPC and MGC's use of Omega as a marketing affiliate, that approval would not absolve MPC and MGC of their duty to comply with the requirements of their tariffs. Those tariffs require MPC and MGC, while acting as transporters of gas, to maintain the confidentiality of operational and accounting information. Instead, they shared that information with Omega through the shared presidency of David Ries.

As further support for Count I, Staff contends that MPC and MGC gave special preference to Omega when they did not require Omega to balance its daily use of pipeline capacity. Omega, in its role as a local distribution company supplying gas to Fort Leonard Wood, as well as in its role as a gas marketer for other customers, shipped gas on the pipeline system. The tariffs of MPC and MGC require a shipper on the system to balance the amount of gas it puts into the pipeline with the amount of gas it takes out each day, within a ten percent tolerance range.³⁵ AmerenUE, another shipper on the pipelines, was required to comply with this

³³ Transcript, Page 593, Lines 14-22.

³⁴ Ex. 308.

³⁵ Exhibits 70 and 71.

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requirement.³⁶ MPC and MGC did not require Omega to balance its nomination and usage of gas supplies. On many days, Omega did not nominate any gas into the pipeline, while continuing to deliver gas to its customers at the other end of the pipeline.³⁷ As would be expected, Omega accumulated a substantial imbalance while it was affiliated with MPC and MGC.³⁸

MPC and MGC agree that Omega was not required to balance its gas nominations and usage. However, they contend that by undertaking to balance the overall gas flows on the pipeline system, Omega was performing a valuable service that benefited the pipeline companies and ultimately their other customers.

MPC and MGC explain that pipeline imbalances result from the difference between the volume of gas that a shipper or its agent nominates from the interstate delivering pipeline, and the volume of gas actually used by the shipper. For MPC and MGC, the delivering pipelines are Panhandle Eastern Pipeline Company (PEPL) and Mississippi River Transmission (MRT). A shipper contracts with PEPL or MRT to deliver a certain amount of gas into the MPC and MGC pipeline system. The shipper then uses a certain amount of gas from the MPC and MGC pipeline system at the other end. To the extent the amount of gas used by the shipper differs from the amount put into the pipeline from the interstate pipeline, the MPC and MGC pipeline system is out of balance.

MPC and MGC are gas transporters, not gas merchants, and their tariffs do not allow them to buy or sell gas for any reason.³⁹ As a result, MPC and MGC cannot buy or sell gas off their pipelines to balance the system if the shippers bring too much, or too little, gas into the system. MPC and MGC argue that they used their affiliate, Omega, to balance the system. The pipelines suggest that Omega would reduce its nominations when there was otherwise too much gas in the system, and increase its nominations if other shippers nominated too little gas.⁴⁰

However, there were generally excess amounts of gas in the pipeline system. The real objective of this scheme, as will be explained, was that Omega was able to extract unregulated profits by selling that

³⁶ Transcript, Page 266, Lines 1-22.

³⁷ Ex. 21HC is a sample imbalance summary for a particular date showing the imbalance sustained by Omega and its customers, compared to non-affiliated shippers on the pipeline system.

³⁸ Transcript, Page 548, Lines 1-14. The exact numbers are highly confidential.

³⁹ Ries Rebuttal, Ex. 304, Page 9, Lines 18-19.

⁴⁰ Ries Rebuttal, Ex. 304, Page 12, Lines 10-13.

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accumulated gas to its customers. Through the use of inside information, Omega appears to have also acquired access to additional gas at no cost.

The transportation contracts that MPC and MGC enter into with the various shippers allow the pipelines to retain a certain percentage of the nominated gas as gas lost or unaccounted for during the transportation process.⁴¹ For example, MPC and MGC's contract with AmerenUE, which is a shipper on the pipelines, required AmerenUE to nominate at various times an extra .43 to .50 percent when shipping gas through the pipeline to compensate for lost and unaccounted for gas.⁴² The amount of gas nominated to compensate for lost and unaccounted for gas can vary from contract to contract depending upon the needs of the system and the negotiating position of the parties.⁴³

Some gas is inevitably lost while it is being transported through the pipeline, but to the extent the gas lost is less than the extra nomination required by the contract, lost and unaccounted for gas can accumulate on the system. There was testimony that the extra gas on the system belongs to the pipeline company⁴⁴. However the contracts governing lost and unaccounted for gas were not introduced into evidence. While title to the gas was not clearly established in this case, MPC and MGC's tariffs do not allow them to sell gas for any reason. To get around that problem, MPC and MGC allowed its marketing affiliate, Omega, to under-nominate the amount of gas it put into the pipeline. Omega was then able to deliver more gas to its marketing customers than it put into the system, while collecting payment from the customers for all the gas it delivered. In effect, Omega was thereby able to sell that lost and unaccounted for gas to its marketing customers, with the proceeds ultimately flowing back to the owners of MPC, MGC, and Omega.

This arrangement clearly provides an advantage to Omega as it competes with other marketers to provide service to customers along the length of the pipeline. It may have also resulted in harm to other entities doing business with the pipeline if MPC and MGC had an obligation to notify those entities that the estimated percent of lost and unaccounted for gas was higher than that experienced or to adjust the estimate downward.

The advantage MPC and MGC gave to their affiliate is increased by the inappropriate sharing of confidential information, and explains the likely reason that information was shared. Since David Ries, as President of

⁴¹ Transcript, Page 531, Lines 17-22.

⁴² Transcript, Page 269, Lines 15-17.

⁴³ Transcript, Page 270, Lines 6-11.

⁴⁴ Transcript, Page 270, Lines 20-25.

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Omega, had full access to the confidential records of MPC and MGC, he knew exactly how much gas other shippers were nominating for shipment through the pipeline. With that knowledge, he also knew how much extra lost and unaccounted for gas would be available for Omega to sell to its customers.

Because Omega was not required to balance its gas nominations and usage, it accumulated an imbalance of more than \$1 million worth of gas.⁴⁵ So long as Omega was owned by the same people that owned MPC and MGC, that imbalance represented additional unregulated profit that could be hidden from regulators charged with examining MPC and MGC's income to set the rates they could charge their customers. It also provided significant advantage to Omega in competing with other entities.

Conclusions of Law

1. Section 12.b of the General Terms and Conditions of the tariffs issued by MPC and MGC provides:

For efficiency purposes, Transporter occupies office space on the same floor as its affiliates, but maintains separate operational facilities and personnel. Operational and accounting information is confidentially maintained by Transporter.⁴⁶

2. Section 2.b of the General Terms and Conditions of the tariffs issued by MPC and MGC provides in relevant part: "If, due to operating conditions, the quantities of gas received and delivered are not in balance on any one particular day, such imbalance shall be corrected as promptly as is consistent with operating conditions."⁴⁷ This section of the tariff requires all shippers on the pipeline to balance the gas they put into the pipeline with the gas they take out on a daily basis.

3. The Commission's Affiliate Transaction rule for gas utilities, 4 CSR 240-40.015(1)(A), defines an affiliated entity as "any person, including a ... corporation ... which directly or indirectly, through one (1) or more intermediaries, controls, is controlled by, or is under common control with the regulated gas corporation." Until it was sold on June 1, 2006, Omega met the definition of an entity affiliated with MPC and MGC.

4. Commission Rule 4 CSR 240—40.015(2) provides:

(A) A regulated gas corporation shall not provide a financial advantage to an affiliated entity. For purposes of

⁴⁵ Transcript, Page 548, Lines 10-14.

⁴⁶ Exhibits 70 and 71, Tariff Sheet No. 39.

⁴⁷ Exhibits 70 and 71, Tariff Sheet No. 26.

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this rule, a regulated gas corporation shall be deemed to provide a financial advantage to an affiliated entity if-

1. It compensates an affiliated entity for goods or services above the lesser of-

A. The fair market price; or

B. The fully distributed cost to the regulated gas corporation to provide the goods or services for itself; or

2. It transfers information, assets, goods or services of any kind to an affiliated entity below the greater of-

A. The fair market price; or

B. The fully distributed cost to the regulated gas corporation.

(B) Except as necessary to provide corporate support functions, the regulated gas corporation shall conduct its business in such a way as not to provide any preferential service, information or treatment to an affiliated entity over another party at any time.

5. MPC and MGC violated Commission Rule 4 CSR 240-40.15(2)(B)'s prohibition on affiliate transactions in that:

A) MPC and MGC provided preferential service information and or treatment:

1) By sharing confidential pipeline operations information with Omega;

2) By not requiring Omega to operate in balance within the parameters of its tariffs while requiring all other entities to do so; and

3) By allowing Omega to sell lost and unaccounted for gas.

B) MPC and MGC, violated provisions of Commission Rule 4 CSR 240-40.15(2)(A) by transferring gas to Omega at a price lower than the greater of fair market price or cost.

Decision

Did MPC and MGC violate the terms of their tariffs and Commission affiliate transactions rules (4 CSR 240-40.016) by permitting Omega Pipeline Company to use confidential customer information in a discriminatory manner for each of Omega's contracts with customers served by MPC and MGC and by allowing gas to be transferred to Omega at an amount lower than the greater of full market value or cost.

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The evidence shows that MPC and MGC operated in a manner that gave their marketing affiliate, Omega, complete access to what should have been confidential information about the natural gas nominations made by and actual gas used by other shippers on the pipeline. Access to that information allowed Omega to adjust its own gas nominations to avoid the need to nominate any gas on many days. This allowed Omega to profit from the sale of lost and unaccounted for gas. With such inside information and preferential treatment, Omega had an unfair advantage in competing for customers. The improper sharing of confidential information violated the terms of MPC and MGC's tariffs. The improper transfer of utility assets to an affiliate without consideration violated the Commission's affiliate transactions rule. Allowing Omega to operate in violation of its tariff requirements for imbalance provided Omega with preferential treatment.

MPC and MGC did not maintain separate operational facilities or personnel from Omega, in its role as an affiliated marketing entity. Beginning in 2003, David Ries was part-owner and president of MPC and MGC, as well as Omega. Ries negotiated gas sales and transportation arrangements with municipalities and other end-users for Omega, and then determined the MPC and MGC transportation arrangements that would apply to the Omega gas transactions. In his role with MPC and MGC, Ries gained inside knowledge of pipeline information such as pipeline gas imbalances, lost and unaccounted for gas levels, actual daily gas demand, and information about other shippers that is not available to any other shipper on the MPC and MGC pipeline system. Ries used this information to enter into transportation arrangements that were advantageous to Omega. Those advantageous arrangements were not made available to other shippers. Staff proved Count I of its complaint.

Count II

Findings of Fact

The second count of Staff's complaint alleges that MPC and MGC violated their tariffs by transporting gas to certain customers without obtaining a signed transportation agreement with those customers. The customers in question are G-P Gypsum Corporation and Willard Asphalt Paving, Inc., two large industrial users of natural gas, located along the pipeline route.

As explained more fully in the Conclusions of Law section of the Report and Order, MPC and MGC's tariffs state that the companies will provide gas transportation service to shippers who have executed a

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transportation agreement.⁴⁸ MPC and MGC transported gas to meet the needs of the two industrial customers, but never entered into a Transportation Agreement with either of them. MPC and MGC acknowledge transporting gas to serve these customers, but contend that no transportation agreement was necessary because the gas supplied to those customers was transported under the terms of a transportation agreement with the City of Cuba.

The City of Cuba has had valid Transportation Agreements with MPC⁴⁹ and MGC⁵⁰ since at least July 1, 1999, a date before MPC and MGC were purchased by their current owners. Beginning on July 1, 2003, Omega entered into a marketing agreement with Cuba.⁵¹ Subsequently, Omega entered into separate marketing agreements with the two industrial customers.⁵² These marketing agreements are the basis for MPC and MGC's argument that it can transport gas to G-P Gypsum and Willard Asphalt without a separate transportation agreement.

Gas marketing agreements are common in the natural gas industry. Under such an agreement, a relatively small municipal gas system or industrial customer hires an experienced gas marketer to purchase their gas supply, administer contracts, and monitor the nomination process to transport the gas to their customers.⁵³ The field of gas marketing is competitive and is not regulated by this Commission. Indeed, other gas marketers currently provide service to other small towns along the MPC and MGC pipelines,⁵⁴ and such towns do not have separate transportation agreements with the pipeline.⁵⁵

In general, there is nothing wrong with gas marketing agreements. Such agreements only become problematic when the gas marketer is in an affiliate relationship with a pipeline company. The problem is, such a gas marketing agreement by an affiliate of a pipeline utility allows the utility to hide transportation discounts given to an unregulated marketing affiliate. A pipeline utility negotiating a transportation agreement with a gas marketing affiliate has a strong incentive to slash its transportation rates for an affiliate, since the money ultimately ends up in the same pocket.

⁴⁸ Imhoff Direct, Ex. 1, Page 5, Lines 2-4.

⁴⁹ Cuba's Transportation Agreement with MPC is Ex. 23HC.

⁵⁰ Cuba's Transportation Agreement with MGC is Ex. 24HC.

⁵¹ Omega's marketing contract with Cuba is Appendix I to Ries Rebuttal, Ex. 304.

⁵² Omega's marketing contract with G-P Gypsum took effect on August 1, 2003, and is Ex. 32. Omega's marketing contract with Willard Asphalt took effect on April 1, 2004 and is Ex. 33.

⁵³ Smith Rebuttal, Ex. 303, Page 10, Lines 14-22.

⁵⁴ Smith Rebuttal, Ex. 303, Page 11, Lines 16-21.

⁵⁵ Ries Rebuttal, Ex. 304, Page 18, Lines 14-23.

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The unregulated gas marketing affiliate that receives the benefit of reduced transportation rates can offer a portion of those saving to prospective customers, thereby gaining a competitive advantage over other gas marketers seeking to serve the same customers. Meanwhile, the utility's regulated rates will be based, in part, on the income earned by the utility. To the extent that the regulated utility's income from providing transportation is transferred to an unregulated affiliate, the regulated rates of the utility will need to be increased. Ultimately, the customers served by the utility could be required to pay the cost of the transportation discounts given to the marketing affiliate.

MPC and MGC's tariff states that transportation services are to be provided to any shipper who enters into a transportation agreement. The tariffs do not define "shipper," and MPC and MGC would circularly define a "shipper" simply as someone who has entered into a transportation agreement. By their definition, a gas customer who receives deliveries of gas under some other customer's transportation agreement is not a "shipper" and does not need to enter into a transportation agreement. That definition makes sense in the context of an unaffiliated gas marketer, but it does nothing to prevent the previously described affiliate abuse problem.

Staff would apply a definition of "shipper" taken from the Commission's marketing affiliate transaction rule, 4 CSR 240-40.016(1)(M). That section defines "shipper" to include "all current and potential transportation customers on a regulated gas corporation's natural gas distribution system." If that definition were applied to MPC and MGC's tariffs, then Staff would read the tariff as limiting the provision of transportation service to those end-use customers who have entered into a transportation agreement. The consistent application of Staff's definition to the tariffs would also, effectively bar all gas marketers, unaffiliated as well as affiliated, from the MPC and MGC pipelines unless the marketer's customers enter into a separate transportation agreement with the pipelines.

Conclusions of Law

1. MPC and MGC's tariffs contain two provisions that define when transportation service is to be available to any shipper. For Firm Provisional Transportation Service, the clause is found in Section 1, Tariff Sheet No. 4. For Interruptible Provisional Transportation Service, the clause is found in Section 1, Tariff Sheet No. 15. Both tariff sheets state in relevant part as follows:

1. . . . Such transportation service shall be available for any Shipper:

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...
c. which has executed a Transportation Agreement wherein Transporter has agreed to transport natural gas for Shipper's account up to a specific maximum daily transportation volume. . . .

2. The definition section of the Commission's Marketing Affiliate Transactions Rule states: "Shippers means all current and potential transportation customers on a regulated gas corporation's natural gas distribution system."⁵⁶ Although it could have done so, the Commission did not include a provision in the Marketing Affiliate Transactions Rule requiring all shippers - defined as all current and potential transportation customers - on a pipeline to execute a separate transportation agreement before receiving natural gas delivered through the pipeline.

Decision

Did MPC and MGC violate their tariffs by transporting natural gas to certain Omega customers without an executed transportation agreement?

Staff would interpret MPC and MGC's tariff as requiring every current or potential transportation customer who receives natural gas delivered through the pipeline to have executed a transportation agreement. Staff would then seek penalties against MPC and MGC for having violated this interpretation of their tariff.

Staff's interpretation of the tariff is not consistent with industry practice in that customers of non-affiliated gas marketers generally do not need to have a separate shipping agreement with the pipeline. Indeed, Staff does not attempt to apply such an interpretation to natural gas deliveries to customers through gas marketers not affiliated with MPC and MGC. Staff bases its interpretation on a definition of shipper taken from the context of the Commission's Marketing Affiliate Transactions Rule, but does not offer a consistent basis for applying that definition outside the confines of that narrow rule.

Staff describes a legitimate concern about abuse of the affiliate relationship engendered by the concealment of transportation discounts given to a gas marketing affiliate. The Commission will address that concern again in a broader context in Count III of Staff's complaint. However, within the narrower parameters of Count II of Staff's complaint, the Commission must find that the language of MPC and MGC's tariff's do

⁵⁶ Commission Rule 4 CSR 240-40.016(1)(M).

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not require every current or potential transportation customer who receives natural gas delivered through the pipeline to have executed a transportation agreement. MPC and MGC did not violate that provision of their tariffs by transporting gas to such customers, and relief on Count II of Staff's complaint will be denied.

Count III
Findings of Fact

The third count of Staff's complaint alleges MPC and MGC offered certain transportation discounts to Omega, at a time when Omega was an affiliated company. MPC and MGC's tariffs provide that "the lowest transportation rate charged to an affiliate shall be the maximum rate that can be charged to non-affiliates."⁵⁷ Staff claims the discounts MPC and MGC gave to Omega set a new lower standard for the amount MPC and MGC could charge non-affiliated companies for transportation service. Staff asks the Commission to adjust MPC and MGC's rates accordingly.

When evaluating Staff's claim, the Commission must determine whether MPC and MGC gave a discount to Omega. While it was affiliated with MPC and MGC, Omega operated in two roles. Initially, beginning in 1992, long before the companies were purchased by their current owners, Omega owned the natural gas distribution system on the federal enclave of Fort Leonard Wood, and sold gas to the Fort under a marketing contract. In that role, Omega entered into a transportation agreement with MPC and MGC to transport natural gas to Fort Leonard Wood.⁵⁸ At that time, MPC, MGC, and Omega were owned by Utilicorp, n/k/a Aquila. Omega's marketing contract with Fort Leonard Wood expired on September 30, 2002, and Omega did not sell gas to the Fort from October 1, 2002, through January 31, 2005. Omega regained the contract with the Fort on February 1, 2005, and once again transports gas through the pipelines for sale to the Fort.⁵⁹

Omega's other role began on July 1, 2003, when its Natural Gas Sales and Agency Agreement with the City of Cuba went into effect.⁶⁰ Under that agreement, Cuba agreed to pay Omega "a fixed fee of . . . per Dth of Gas delivered to reimburse Seller [Omega] for all transportation fees (reservation and commodity) incurred by Seller on all upstream pipelines to transport said Gas purchased hereunder to the Delivery Point [the Cuba

⁵⁷ Tariff Sheet No. 6, Section 3.2b(1), Exhibits 70 and 71.

⁵⁸ Ries Rebuttal, Ex. 304, Page 6, Lines 5-11.

⁵⁹ Id. at Page 6, Lines 12-17.

⁶⁰ Ex. 22.

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City Gate].”⁶¹ That contract also appointed Omega as Cuba’s agent to “nominate and administer the transportation of natural gas and pay the monthly invoices for the transportation services provided by MPC and MGC, and any other third party transporter, exclusive of the fuel charge.” The contract required Cuba to reimburse Omega for the actual cost of the gas purchased under the contract. The gas that Omega purchased on behalf of Cuba was moved through the pipelines using the capacity reserved by Cuba under the 1999 Transportation Agreements between Cuba and MPC⁶² and MGC.⁶³ By entering into this sales and agency agreement with Cuba, Omega became an affiliated gas marketer.

Before July 1, 2003, MPC and MGC charged the maximum tariff rates for transportation service for all shippers as shown in the following chart:⁶⁴

Transportation Type/ Delivery Points	Firm	Firm	Interruptible
	Reservation per MDQ	Commodity Per Dt.	Commodity Per Dt.
MPC Delivery	\$4.3181	\$.1699	\$.3036
MGC Delivery Except the Fort	\$13.1766	\$.9433	\$1.3765
MGC Delivery to the Fort	\$18.10	\$.55	\$1.15

After July 1, 2003, MGC began charging Omega a reduced commodity charge of \$.20 for delivering gas to Cuba. That rate is demonstrated by recreated invoices supplied by MGC. Specifically, Exhibit 67-E, which is comprised of recreated invoices for services beginning in January 2004, shows a commodity charge of \$.20 for contract number MG-1009-TAF. That contract number is the Transportation Agreement with Cuba as shown in Exhibit 24.

The recreated invoices in evidence only go back to January 2004, MPC and MGC refused to produce such invoices for 2003.⁶⁵ For reasons previously explained in detail in its discussion of Staff’s motion for sanctions for destruction of documents, the Commission will infer that if such invoices

⁶¹ Id. The amount of the fixed fee is highly confidential.

⁶² Ex. 23.

⁶³ Ex. 24.

⁶⁴ The chart is taken from Schallenberg Direct, Ex. 19, Page 24, Lines 4-11.

⁶⁵ Transcript, Page 92, Lines 20-22.

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were available, they would show that Omega began receiving the discount on July 1, 2003.

In their defense, MPC and MGC contend they gave the transportation discount to the City of Cuba and not to Omega. Obviously, the City of Cuba is not affiliated with MPC and MGC, so a discount given to Cuba would not need to be extended to non-affiliated shippers.

In support of their contention that the discount was given to the City of Cuba, MPC and MGC point to a letter from David Ries, as President of MPC, to the Mayor of Cuba, dated July 7, 2003.⁶⁶ The letter purports to memorialize a previous discussion in which MPC agrees to give Cuba a discounted commodity rate. However, unlike other letters from Ries purporting to memorialize discussions with municipalities about discounts, the July 7, 2003, letter to Cuba does not contain a signature from the recipient accepting and agreeing to the modification. Unlike those letters, the July 7, 2003, letter is not even formatted to contain such a signature.⁶⁷ These inconsistencies lead to the conclusion that Exhibit 26 was created after the fact to bolster MPC and MGC's position.

MPC and MGC also contend Omega was merely acting as an agent for Cuba in purchasing natural gas for the city and then transporting that gas to Cuba using the city's transportation agreement with the pipelines. However, that transportation agreement, which has been in effect since 1999, before MPC and MGC were purchased by their current owners, requires Cuba to pay full tariff rates to transport gas on the pipelines.⁶⁸ The sales and agency agreement between Cuba and Omega requires Cuba to pay a fixed fee to reimburse Omega for the cost of transporting gas through the pipelines.⁶⁹ The invoices, which show the amount Omega was actually billed for the transportation of gas to Cuba, allowed Staff to discover the discounted commodity charge that was given to Omega. In sum, Omega was charging Cuba the transportation costs set in the sales and agency agreement, while paying MPC and MGC the discounted commodity charge identified by Staff. Omega kept the difference as extra profit.

Furthermore, MPC and MGC point out that the gas moved to the other Omega customers, G-P Gypsum and Willard Asphalt, was moved using the pipeline capacity of Cuba. They suggest that somehow that fact

⁶⁶ Ex. 26.

⁶⁷ For comparison see Ex. 25, an August 9, 2002 letter to Cuba; Ex. 27, an April 12, 2006, letter to the City of Waynesville; and Ex. 28, a December 18, 2002 letter to Waynesville.

⁶⁸ Exhibits 23 and 24.

⁶⁹ Ries Rebuttal, Ex. 304, Appendix I.

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means that the transportation discounts they offered were made to a non-affiliated shipper. However, Omega's marketing contract with Cuba did not give it any authority to use Cuba's pipeline capacity to deliver gas to other customers. MPC and MGC's tariffs did not contain any provisions that would allow Cuba to release its capacity for the use of other shippers.⁷⁰ Ries, testifying on behalf of MPC and MGC conceded that Cuba likely did not even know that its capacity was being used in this manner.⁷¹

As MPC and MGC explain, there would be nothing wrong with this arrangement if Omega was not an affiliate of MPC and MGC. As an unregulated gas marketer, Omega is free to make a profit by marking up charges for elements of the bundled marketing services it provides to Cuba, and other shippers. Generally if a gas marketer can negotiate a better deal with the pipelines, it is welcome to keep the difference between what it pays the pipeline and what it collects from its customer as profit generated by its skills as a negotiator.

However, Omega was an affiliate of MPC and MGC. David Ries was President of both Omega and the pipeline companies. Therefore, he was on both sides of the negotiation and was in a position to grant himself a shipping discount. By giving the unregulated affiliate, Omega, a shipping discount, Ries could transfer income from the regulated utilities to the unregulated affiliate. Subsequently, in any future rate case, the regulated utilities would be in a position to justify charging higher rates to their captive customers. Furthermore, the increased profit made possible by the discounted transportation rates, would allow Omega to offer a better deal to the municipalities and other shippers to whom it was offering its marketing services, thereby gaining a competitive advantage. It is exactly this sort of affiliate abuse that MPC and MGC's tariff is seeking to prevent when it requires that shipping discounts given to an affiliate also be passed on to non-affiliates.

In their defense, MPC and MGC argue that Omega has consistently paid the highest rates of any shipper on the Pipelines' systems. In support of this claim, MPC and MGC offered the testimony of Christopher John, a former technical advisor at the FERC. John presented calculations, based on the 25 percent load factor specified in the tariff, which combined the reservation and commodity rates into a single volumetric transportation rate. His calculations show that from February 2005 through March 2006, Omega

⁷⁰ Transcript, Page 650, Lines 12-16.

⁷¹ Transcript, Page 651, Lines 12-16.

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was charged a combined transportation rate of \$2.6803/Dth, which was the highest transportation rate on the system.⁷²

The principle flaw in John's argument is that his calculation reflects the transportation rate paid by Omega under the contract between MGC and Omega for transportation of gas to Fort Leonard Wood. It does not reflect the rates Omega paid to transport gas to customers other than Fort Leonard Wood. Since Fort Leonard Wood is located at the terminal end of the MGC pipeline, it is to be expected that Omega would be charged the highest rates of any shipper for transporting gas to the end of the pipeline. In contrast, the recreated invoices contained in Exhibit 67, Appendix E, show that when transporting gas to the City of Cuba, Omega was charged a combined volumetric transportation rate of \$1.9328/Dth, which was the lowest rate on the pipeline system.

As of July 1, 2003, the lowest rates MPC and MGC were charging Omega, an affiliated shipper, are shown in the following chart:⁷³

Transportation Type/ Delivery Points	Firm	Firm	Interruptible
	Reservation per MDQ	Commodity Per Dt.	Commodity Per Dt.
MPC Delivery	\$4.3181	\$1.699	\$3.036
MGC Delivery Except the Fort	\$13.1766	\$20	\$1.3765
MGC Delivery to the Fort	\$18.10	\$55	\$1.15

The previously discussed discount was just the first given by MPC and MGC to Omega. On September 1, 2003, MPC and MGC began providing discounted interruptible transportation service to Omega to allow Omega to provide bundled natural gas service to G-P Gypsum.⁷⁴ Subsequently, Omega entered into a similar agreement with Willard Asphalt Paving, Inc., effective April 1, 2004.⁷⁵ At that time, Omega did not have a separate Transportation Agreement with MPC and MGC relating to its role

⁷² John Rebuttal, Ex. 300, Page 26, Table beginning at Line 12.

⁷³ The chart is taken from Schallenberg Direct, Ex. 19, Page 25, Line 1.

⁷⁴ Omega's Natural Gas Sales Agreement with G-P Gypsum is Ex. 32. The sales agreement states that it became effective on August 1, 2003, but it was not executed until August 19, 2003. Staff based its calculations on the assumption that the agreement became effective on September 1. The Commission will do the same.

⁷⁵ Omega's Natural Gas Sales Agreement with Willard Asphalt is Ex. 33.

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as a gas marketer. Instead, it moved gas through the pipelines to G-P Gypsum and Willard Asphalt using Cuba's Transportation Agreements.

Exhibits 35 and 36 are recreated invoices that illustrate the rates Omega, as a marketing affiliate, was charged to transport gas for G-P Gypsum and Willard Asphalt. Rather than send a separate bill to Omega for each of its marketing customers, the pipeline charges are included on a single bill, with detail that allowed Omega to determine the volumes delivered to each of its customers. Exhibits 35 and 36 show a total delivery of 11,077 Dths to three customers; 2,003 Dths were delivered to the Willard Asphalt interconnect, 5,565 Dths were delivered to the Cuba city gate on behalf of G-P Gypsum, and 3,509 Dths were delivered for use by the City of Cuba.

The invoice to Omega shows that the same commodity rates were charged for all volumes transported. Specifically, MPC and MGC charged Omega a MGC commodity rate of \$.20/Dth, and a MPC commodity rate of \$.1699/Dth. However, while the gas transported for Cuba was under firm transportation, the gas transported for G-P Gypsum was interruptible in nature,⁷⁶ as was that supplied to Willard Asphalt.⁷⁷ Thus, while the gas was delivered using the capacity reflected in the firm transportation contract between the pipelines and Cuba, the transportation service provided to G-P Gypsum and Willard Asphalt was actually interruptible. Since interruptible service does not provide for guaranteed capacity on the pipeline, there is no reservation charge. Therefore, the only charges reflected on the invoice for charges related to the transportation of gas to G-P Gypsum and Willard Asphalt is the MGC commodity rate of \$.20/Dth and the MPC commodity rate of \$.1699/Dth.

As of September 1, 2003, the lowest rates MPC and MGC were charging Omega, an affiliated shipper, are shown in the following chart:⁷⁸

⁷⁶ Schallenberg Surrebuttal, Ex. 67, Page 9, Lines 9-13.

⁷⁷ Ex. 33.

⁷⁸ The chart is taken from Schallenberg Direct, Ex. 19, Page 25, Line 15.

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Transportation Type/ Delivery Points	Firm	Firm	Interruptible
	Reservation per MDQ	Commodity Per Dt.	Commodity Per Dt.
MPC Delivery	\$4.3181	\$.1699	\$.1699
MGC Delivery Except the Fort	\$13.1766	\$.20	\$.20
MGC Delivery to the Fort	\$18.10	\$.55	\$1.15

On February 1, 2005, MGC began giving Omega an additional discount for the transportation of gas to Fort Leonard Wood. MGC's tariff establishes a maximum \$.55/Dth commodity charge for firm transportation service to Fort Leonard Wood.⁷⁹ However, the invoices collected in Exhibit 67-D show that beginning on February 1, 2005, when Omega regained the contractual right to supply gas to the Fort, Omega was actually billed a commodity rate of \$.30/Dth for firm transportation service to Fort Leonard Wood.⁸⁰

As of February 1, 2005, the lowest rates MPC and MGC were charging Omega, an affiliated shipper, are shown in the following chart:⁸¹

Transportation Type/ Delivery Points	Firm	Firm	Interruptible
	Reservation per MDQ	Commodity Per Dt.	Commodity Per Dt.
MPC Delivery	\$4.3181	\$.1699	\$.1699
MGC Delivery Except the Fort	\$13.1766	\$.20	\$.20
MGC Delivery to the Fort	\$18.10	\$.30	\$1.15

⁷⁹ Ex. 70, Tariff Sheet No. 5.

⁸⁰ The invoices collected in Ex. 67-D state on their face that they are for services provided beginning in February 2004. However, these are recreated invoices and they contain an incorrect date. Other evidence indicates Omega did not resume supplying gas to Fort Leonard Wood until February 2005, and MPC and MGC do not dispute the assertion that the dates on the recreated invoices are incorrect. Therefore, the Commission finds that the invoices in question are for the period after February 1, 2005.

⁸¹ The chart is taken from Schallenberg Direct, Ex. 19, Page 26, Line 5.

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On May 1, 2005, MPC and MGC gave an additional transportation discount to Omega for service provided to another bundled service customer. This time the customer was Emhart Glass Manufacturing, Inc. Omega had entered into a firm Natural Gas Sales Agreement with Emhart Glass beginning on December 1, 2004.⁸² This was a firm contract and thus would ordinarily include a reservation charge. However, beginning on May 1, 2005, the invoices do not include a reservation charge, indicating that MPC and MGC waived that reservation charge for Omega's delivery of gas to Emhart Glass. On May 1, 2005, MGC was still charging Omega the maximum commodity rate under its tariff. That changed as of June 1, 2005, when the commodity rate for gas transported to Emhart Glass was reduced to \$.30/Dth, the rate previously set for service to Fort Leonard Wood.⁸³

As of May 1, 2005, the lowest rates MPC and MGC were charging Omega, an affiliated shipper, are shown in the following chart:⁸⁴

Transportation Type/ Delivery Points	Firm	Firm	Interruptible
	Reservation per MDQ	Commodity Per Dt.	Commodity Per Dt.
MPC Delivery	\$0.00	\$.1699	\$.1699
MGC Delivery Except the Fort	\$0.00	\$.20	\$.20
MGC Delivery to the Fort	\$18.10	\$.30	\$1.15

Conclusions of Law

1. The Firm Provisional Transportation Service, and Interruptible Provisional Transportation sections of MPC and MGC's tariffs contain provisions indicating as follows:

3.2 Range of Rates

b. For all Transportation Agreements entered into by Transporter with any affiliate of Transporter after the effective date of tariff sheets having a Date of Issue of January 18, 1995, in those instances in which the term of the Agreement is greater than three (3) months:

⁸² Ex. 45.

⁸³ Ex. 67-D, Appendix D-17.

⁸⁴ The chart is taken from Schallenberg Direct, Ex. 19, Page 27, Line 1.

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- (1) The lowest transportation rate charged to an affiliate shall be the maximum rate that can be charged to non-affiliates. Any renegotiation or other type of modification to the rates of any then-effective Transportation Agreement is to be considered an applicable Transportation Agreement for the purpose of setting this maximum rate for non-affiliates.
 - (2) Transporter will submit each such Transportation Agreement for Commission approval in those instances in which the rate offered to a non-affiliate is proposed to be greater than any rate offered to any affiliate.
 - (3) Transporter will submit a rate comparison for all Transportation Agreements.
 - (4) Rate comparisons for compliance with these provisions will be calculated assuming a 25% load factor.
 - (5) These provisions will be applied to the Transporter's service area and the service area of Missouri Pipeline Company [Missouri Gas Company] as separate entities and on a separate basis.
- c. If at some point in time the Staff of the Commission determines that the provisions of Section 3.2(b) and Section 12(c) of the General Terms and Conditions are not effective in preventing rate discrimination to non-affiliates, after contacting Transporter, the Staff may file a notice to that effect with the Commission. As a consequence, on the date of such notice filing, said provisions will be terminated and at that point in time the following provisions will automatically replace Section 3.2(b) and Section 12(c) of the General Terms and Conditions with regard to all

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Transportation Agreements in effect at the time of
Staff's filing of said notice with the Commission:

The transportation rate charged
to any affiliate on the
Transporter's pipeline pursuant to
a Transportation Agreement for a
term greater than three (3)
months entered into after January
5, 1995 shall be the maximum
rate which may be charged to
non-affiliates.⁸⁵

From July 1, 2003, when MPC and MGC offered their first transportation rate discount to Omega, until June 1, 2006, when Omega was sold to an unaffiliated entity, Omega was affiliated with the pipeline companies and was an "Affiliate of Transporter" within the meaning of this tariff provision. Therefore, by terms of this tariff provision, the lowest transportation rate MGC and MPC offered to Omega is the maximum rate they can charge to a non-affiliated shipper.

2. MPC and MGC's tariffs limit the maximum transportation rate they can charge a non-affiliated shipper to the lowest rate charged to an affiliated shipper. However, they do not indicate that the new maximum rates are to automatically go into effect immediately upon the offering of a lower rate to an affiliate. Instead, Section 3.2(c) of those tariffs, as quoted in the previous paragraph, specifies that if Staff determines that the provisions of Section 3.2(b) and Section 12(c)⁸⁶ of the General Terms and Conditions Section of the tariffs are "not effective in preventing rate discrimination to non-affiliates", it may, "after contacting Transporter, ... file a notice to that effect with the Commission." Once Staff files its notice, Sections 3.2(b) and Section 12(c) are to be automatically replaced with a revised tariff provision that simply states that "[t]he transportation rate charged to any affiliate on the Transporter's pipeline . . . shall be the maximum rate which may be charged to non-affiliates."

⁸⁵ Ex. 70, Tariff Sheet Nos. 6-7 and 16-17, Ex. 71, Tariff Sheet Nos. 5-6 and 16-17. The Commission required MPC and MGC to include these provisions in their tariffs as a condition for approving the transfer of those companies to UtiliCorp in 1994. See, *In the Matter of the Joint Application of Missouri Gas Company, Missouri Pipeline Company, and UtiliCorp United, Inc.*, Report and Order on Rehearing, 3 Mo. P.S.C. 236 (1994).

⁸⁶ Section 12.c requires the Transporter to supply a list of discounts offered to affiliated entities.

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3. Staff has never explicitly filed the notice described by Section 3.2c. However, Staff filed this complaint, seeking to reduce rates under the terms of the MPC and MGC tariffs, on June 21, 2006. If that date is accepted as the date Staff gave notice to MPC and MGC, then the revised tariff provision and the reduced rates went into effect on that date.

4. The portion of Section 3.2c of MPC and MGC's tariff that is to go into effect after Staff gives its notice could be seen as redundant of section 3.2b(1) in that both sections require the lowest transportation rate charged to an affiliate to be the maximum rate charged to a non-affiliate. If that view is accepted, then perhaps MPC and MGC's rates to non-affiliates were automatically reduced at the time they offered reduced rates to their affiliate. However, such a construction of the tariff would render Section 3.2c superfluous.

5. A tariff that has been approved by this Commission becomes Missouri law, with the same force and effect as a statute directly prescribed by the legislature. For that reason, tariffs are to be interpreted in the same manner as a statute.⁸⁷ One principle of statutory construction holds that the legislature is presumed to intend that "every word, clause, sentence, and provision of a statute have effect. Conversely, a presumption exists that the legislature does not insert idle verbiage or superfluous language in the statute."⁸⁸ Applying that rule of construction to its interpretation of the tariff, the Commission must presume that section 3.2c was intended to have some meaning.

6. It seems that section 3.2b and the reporting requirements of section 12.c were inserted into the tariff to establish the principle that affiliates could not be given rate preferences and to give Staff the information it would need to monitor the companies' compliance with that principle. Section 3.2c then kicks in to automatically lower those rates only if Staff determines, and notifies the company and the Commission, that an affiliate has been given a rate preference.

7. Omega was no longer an affiliate of MPC and MGC on June 21, 2006, having been sold to a non-affiliated buyer on June 1, 2006. However, the tariff says nothing about the reduced rates resulting from the offering of discounted rates to an affiliate, automatically reverting to their original levels, absent the filing of a new rate case.

8. Missouri's courts have held that "[t]he Commission has no jurisdiction to promulgate an order requiring a pecuniary reparation or

⁸⁷ State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n, 156 S.W.3d 513, 521 (Mo. App. W.D. 2005).

⁸⁸ Cook v. Newman, 142 S.W.3d 880, 892 (Mo. App. W.D. 2004).

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refund.⁸⁹ Therefore, the Commission cannot order MGC or MPC to make any refund to its customers. If any customer of MGC or MPC seeks such a refund, they will need to file an appropriate petition in circuit court.

9. MPC and MGC argue that the Commission cannot adjust their rates in this case because the Commission has not considered all relevant factors, including operating expenses and the utility's rate of return. The Commission is required to consider those factors in setting rates for a utility.⁹⁰ However, this is not a rate case and the Commission is not attempting to determine an appropriate rate for the companies. Rather, the Commission is simply considering Staff's complaint and determining the applicability of a provision contained in MPC and MGC's tariffs. Simply put, the Commission is acting to enforce an existing tariff rather than exercising its ratemaking authority.

Decision

Did MPC and MGC provide transportation service to its affiliate, Omega, at a discounted rate, and if so, should this rate become the maximum rate that MPC and MGC could charge any of its non-affiliated customers for similar services?

The recreated invoices offered into evidence by Staff show the rate that MPC and MGC actually charged their affiliate, Omega, for transporting natural gas to Omega's gas marketing customers. Those invoices demonstrate that the pipeline companies offered discounted transportation rates to their affiliate. By the explicit terms of their tariffs, the lowest transportation rate MPC and MGC charged an affiliate is the maximum rate they can charge to a non-affiliate.

For MPC and MGC, those discounted rates, and the dates when the rates were first offered to an affiliate, are shown in the following chart:

⁸⁹ *DeMaranville v. Fee Fee Trunk Sewer, Inc.*, 573 S.W. 2d 674, 676 (Mo. App. E.D. 1978).

⁹⁰ *State ex rel. Util. Consumers Council of Mo., Inc. v. Pub. Serv. Comm'n*, 585 S.W. 2d 41, 49 (Mo banc. 1979)

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Transportation Type/ Delivery Points	Firm	Firm	Interruptible
	Reservation per MDQ	Commodity Per Dt.	Commodity Per Dt.
MPC Delivery	\$0.00 beginning May 1, 2005	\$.1699	\$.1699 beginning September 1, 2003
MGC Delivery Except the Fort	\$0.00 beginning May 1, 2005	\$.20 beginning July 1, 2003	\$.20 beginning September 1, 2003
MGC Delivery to the Fort	\$18.10	\$.30 beginning February 1, 2005	\$1.15

Pursuant to section 3.2c of the Firm Provisional Transportation Service and Interruptible Provisional Transportation sections of MPC and MGC's tariff, those discounted rates offered to an affiliate, became the maximum rates that could be charged to non-affiliated shippers on the pipeline when Staff filed this complaint on June 21, 2006.

Count IV
Findings of Fact

The fourth count of Staff's complaint alleges that MPC and MGC violated their tariffs by failing to disclose the discounted transportation rates they gave to their affiliate, Omega. Section 12.c of the General Terms and Conditions section of MPC and MGC's tariffs require them to submit a quarterly report to Staff listing bids or offers they quote for transportation service rates where the bid is for less than the maximum rate established in the tariff. As part of the report, MGC and MPC are required to disclose whether the entity that would receive the discounted rate is an affiliate.⁹¹ In the second and third quarters of 2003, MPC and MGC did not report the discounted rates that it gave to Omega.⁹² Nor did it report giving a discount to any other entity, affiliated or not. The discounts that Staff says MPC and MGC should have reported are the discounts for transportation of gas to the

⁹¹ Ex. 70, Tariff Sheet No. 39, and Ex. 71, Tariff Sheet No. 39.

⁹² Imhoff Direct, Ex. 1, Page 10, Lines 27-30.

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City of Cuba and G-P Gypsum discussed in detail regarding Count III of Staff's complaint. Regardless of whether those discounts were given to Cuba or to Omega, the recreated invoices offered into evidence by Staff demonstrate conclusively that MPC and MGC gave transportation discounts during that period.

MPC and MGC agree that they did not report the discounts described by Staff, but contend that they were under no obligation to report those transactions since the discounts were offered to the City of Cuba, which is not an affiliate.

Conclusions of Law

1. Section 12.c of the General Terms and Conditions section of MPC and MGC's tariffs states as follows:

12. Operation of Rate Schedule in Conjunction with Marketing Affiliates.

...

c. Transporter will submit to the Commission's Energy – Rates Staff once every three months, a list of all bids or offers Transporter quotes for transportation service rates for its pipeline where the bid is less than the Maximum Rate contained in this tariff for Transporter's area. Transporter will provide the bid price quoted, the length of and dates of all offerings, the name, address and telephone number of the party to whom the bid was given, any other terms of the bid and a rate comparison sheet for all bids and offers for each month. For each such bid or offering, Transporter will completely explain whether the entity being offered the rate is affiliated in any way with Transporter or with any of its affiliates. If the entity is affiliated, Transporter will completely explain such affiliation. Transporter will respond immediately⁹³ to Staff inquiries concerning discounting.

This tariff provision requires MPC and MGC to file a report any time they offer a discount to any shipper on their pipelines. It requires them to file

⁹³ Ex. 70, Tariff Sheet No. 39, Ex. 71, Tariff Sheet No. 39.

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additional information if the discount is offered to an affiliate, but it requires the basic report to be filed regardless of whether an affiliate is involved.

Decision

Did MPC and MGC violate their tariffs by failing to report their offer of discounted transportation service to its affiliate, Omega, in its second quarter and third quarter 2003 reports to the Commission's Energy Staff?

The tariff provision in question is designed to allow Staff to monitor the affiliate transactions in which MPC and MGC might engage to ensure that such transactions are not abusive. The plain language of the tariff requires MPC and MGC to report all offered discounts to Staff in a quarterly report. All discounts must be reported, regardless of whether the discounts are offered to an affiliate. The recreated invoices conclusively show that MPC and MGC offered discounts to shippers on their pipelines in the second and third quarters of 2003. Those discounts were not reported to Staff, and thereby the tariff provision was violated. Staff proved count IV of its complaint.

Count V

Findings of Fact

The fifth count of Staff's complaint alleges that MGC violated its certificate of convenience and necessity by constructing a new lateral line off the pipeline to provide service to Willard Asphalt, a gas-marketing customer of Omega.

MGC was issued a certificate by the Commission in Case No. GA-90-280. In a subsequent case, in which the Commission authorized the sale of MPC and MGC to UtiliCorp, the Commission found that "the certificates issued, and which will be passed to UCU as the result of this purchase, are for the operation of a natural gas pipeline. This does not include the sale of gas, the by-pass of LDCs, or operation other than in the designated territory."⁹⁴ In other words, MGC holds a line certificate of convenience from the Commission allowing it to transport natural gas through a described corridor. It does not hold an area certificate that would authorize it to distribute gas to retail customers.

In 2004, MGC constructed a lateral extension from its pipeline to establish a new delivery point to provide gas service to Willard Asphalt. The lateral extension runs about 1400 feet from the pipeline to connect with

⁹⁴ Ex. 83, In the Matter of the Joint Application of Missouri Gas Company, Missouri Pipeline Company, and UtiliCorp United, Inc., Report and Order, 3 Mo P.S.C. 3d 216, 223 (1994).

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the asphalt plant's gas system at a new meter station. The entire extension is located on Willard Asphalt's property.⁹⁵ Willard Asphalt entered into a Natural Gas Sales Agreement with Omega beginning on April 1, 2004.⁹⁶

Staff also alleges that MGC violated its tariff by not requiring either Willard Asphalt or Omega to pay the cost of constructing that lateral line. MGC's tariff requires a shipper, in this case, either Willard Asphalt or Omega, to reimburse the pipeline for the cost of constructing facilities needed to deliver gas to the shipper.⁹⁷ The cost of constructing the lateral to serve Willard Asphalt is on MGC's books, and neither Willard Asphalt, nor Omega, has reimbursed MGC for those costs.⁹⁸

MGC concedes that it paid the cost to construct the lateral but defends that cost as a prudent business decision. MGC indicates that it added a new delivery point to its pipeline to allow it to serve Willard Asphalt, and to create a second delivery point to aid the City of St. Robert in the expansion of its municipal gas system.⁹⁹ MGC also states that the construction of the lateral has substantially increased its revenues and has been a sound investment.¹⁰⁰ Furthermore, MGC has not filed a rate case since the lateral was constructed. As a result, the cost of constructing the lateral is not reflected in MGC's current rates.

Conclusions of Law

27. Section 6.e of the General Terms and Conditions section of MGC's tariff states as follows:

6. Statements and Payments.

e. Shipper will reimburse Transporter or cause Transporter to be reimbursed for any and all costs and expenses incurred in constructing, establishing or modifying the facilities required for receipt and/or delivery of gas hereunder. Upon request, an estimate shall be provided in writing to the Shipper with a breakdown showing at least the major cost components. Shipper shall be responsible for reimbursing Transporter for only

⁹⁵ Transcript, Page 669, Lines 17-25.

⁹⁶ Ex. 33.

⁹⁷ Ex. 70, Tariff Sheet No. 31, General Terms and Conditions Section 6.e.

⁹⁸ Schallenberg Direct, Ex. 19, Pages 35-36, Lines 25-27, 1-2, and Transcript, Page 334, Lines 24-25.

⁹⁹ Ries Rebuttal, Ex. 304, Page 42, Lines 8-14.

¹⁰⁰ Id. at Page 43, Lines 6-18.

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the actual costs incurred by Transporter in constructing, establishing or modifying the facilities required for receipt and/or delivery of gas hereunder.

Decision

Did MGC construct a lateral line for a certain industrial customer to benefit its affiliate, Omega, without demanding reimbursement from either Omega or the customer, in violation of its tariff or its certificate?

Staff established that MGC constructed a short, 1400 foot, line from its main pipeline to establish a connection to serve an industrial customer. MGC can establish a new connection point on its pipeline without violating its line certificate, but at some point, an authorized new connection becomes long enough to constitute a new lateral line that would require a revised certificate. Staff did not present sufficient evidence to establish that this new connection required a revised certificate and that its construction violated MGC's existing certificate of convenience and necessity. Staff has the burden of proving its complaint and it has failed to meet that burden with regard to this aspect of Count V.

The other aspect of Count V alleges MGC violated its tariff by failing to demand reimbursement from the shipper for the cost of constructing the lateral line. MGC's tariff requires the shipper to reimburse MGC for those costs and MGC apparently has not attempted to collect that reimbursement, instead carrying those costs on its own books. Therefore, MGC has violated its tariff.

So far, however, MGC's decision not to seek reimbursement of those costs has not had any impact on its customers. Those costs have not been included in the calculation of MGC's costs for purposes of establishing rates because MGC's rates have not been adjusted since those costs were incurred. MGC's decision not to seek reimbursement of these costs may become important in a future rate case, but it is of no importance now. As a result, there is no need for Staff to seek penalties against MGC for this violation of its tariff.

Count VI

Staff's complaint originally contained a sixth count alleging that MPC and MGC violated their tariffs by providing preferential terms of payment to Omega. In his surrebuttal testimony, Bob Schallenberg

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indicated that Staff is no longer seeking relief on this count.¹⁰¹ Since Staff is no longer seeking relief under this count, the Commission will not address it further.

GENERAL CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law that are applicable to all counts of Staff's complaint:

1. MPC and MGC are "Gas Corporations" and "Public Utilities," as those terms are defined at Section 386.020 (18) and (42), RSMo Supp. 2006. As such, they are subject to regulation by this Commission.

2. Section 393.140(1), RSMo 2000 gives the Commission general supervisory authority over all Missouri gas corporations.

3. Section 393.140(11), RSMo 2000 gives the Commission the power to require every gas corporation to file and maintain public tariffs describing the rates it will charge, as well as the terms under which it will offer service to the public. That section also requires a gas corporation to comply with the terms of its own tariff.

4. A tariff that has been approved by the Commission becomes Missouri law, with "the same force and effect as a statute directly prescribed from the legislature."¹⁰²

5. MPC and MGC are obligated to comply with the provision of their own tariffs.

6. Section 386.390.1, RSMo 2000, authorizes the Commission to bring a complaint against a public utility on its own motion.

7. As the party bringing a complaint, Staff has the burden of proving its allegations.¹⁰³

8. Section 386.570.1, RSMo 2000 provides that any public utility that fails to comply with any provision of law, or with any "order, decision, decree, rule, direction, demand or requirement" of the Commission "is subject to a penalty of not less than one hundred dollars nor more than two thousand dollars for each offense."

9. The General Counsel of the Commission is authorized by Section 386.600, RSMo 2000, to bring an action in circuit court to recover a penalty against a public utility.

¹⁰¹ Schallenberg Surrebuttal, Ex. 67, Page 1, Lines 17-22.

¹⁰² State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n, 156 S.W. 3d 513, 521, (Mo. App. W.D. 2005)

¹⁰³ State ex rel. GS Technologies Operating Co., Inc. v. Pub. Serv. Comm'n, 116 S.W.3d 680 (Mo. App. W.D. 2003).

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IT IS ORDERED THAT:

1. Staff proved the allegations contained in Count I of its complaint. The Commission's General Counsel is authorized, pursuant to Section 386.600, RSMo 2000, to file a petition in the circuit court of his choosing to seek any applicable penalties against Missouri Pipeline Company and Missouri Gas Company.

2. Staff failed to prove the allegations contain in Count II of its complaint and relief on that Count is denied.

3. Staff proved the allegations contained in Count III of its complaint. By the terms of their tariffs, the rates Missouri Pipeline Company and Missouri Gas charged to an affiliated shipper became the maximum rate that could be charged to a non-affiliated shipper on June 21, 2006, as indicated in the following chart:

Transportation Type/ Delivery Points	Firm	Firm	Interruptible
	Reservation per MDQ	Commodity Per Dt.	Commodity Per Dt.
MPC Delivery	\$0.00 beginning May 1, 2005	\$.1699	\$.1699 beginning September 1, 2003
MGC Delivery Except the Fort	\$0.00 beginning May 1, 2005	\$.20 beginning July 1, 2003	\$.20 beginning September 1, 2003
MGC Delivery to the Fort	\$18.10	\$.30 beginning February 1, 2005	\$1.15

4. Staff proved the allegations contained in Count IV of its complaint. The Commission's General Counsel is authorized, pursuant to Section 386.600, RSMo 2000, to file a petition in the circuit court of his choosing to seek any applicable penalties against Missouri Pipeline Company and Missouri Gas Company.

5. Staff failed to prove the allegations contain in Count V of its complaint and relief on that Count is denied.

6. Staff's Motion for Sanctions for Destruction of Documents is denied except for the adverse evidentiary inferences explained in the body of this Report and Order.

7. Respondents' Motion to Supplement Exhibit 311 is denied.

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8. This Report and Order shall become effective on September 7, 2007.

Davis, Chm., Gaw, and Clayton, CC., concur;
Murray, C., dissents, with separate dissenting opinion attached;
Appling, C., dissents;
and certify compliance with the provisions
of Section 536.080, RSMo 2000.

NOTE: See pages 383 and 459 for other orders in this case.

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

I must dissent from the majority's decision to adopt this Report and Order. In my opinion, the majority of the Commission engaged in a highly unusual procedural practice that removed fairness from the process and may have violated principles of due process.

Following the completion of the evidentiary hearing and submission of briefs, the Commission discussed the case in Agenda. During that Agenda meeting, the majority of the Commissioners indicated that they did not have the necessary information to move forward and requested an on-the-record presentation so that they could obtain more information. At the time, I stated my concern that such a presentation would establish a bad precedent and may create grounds for appeal.

The requested presentation occurred on July 10, 2007 and was nothing more than an opportunity for Staff to bolster a weak case. At that presentation, the attorneys for Staff and intervenors made numerous assertions and basically testified, all of which was not subject to cross-examination. Mr. Brown, Counsel for Respondents, summarized the on-the-record presentation best in his opening statement: "Much of the Staff's argument in this case today was speculation about the meaning of exhibits where there's actual sworn testimony on the same topics. We've got attorneys who admit they haven't read the record in the case speculating about what various exhibits mean when there is actual sworn testimony in the case about those same topics."

Following the on-the-record presentation, a majority of the Commission found a violation in regard to Counts I, III and IV. Clearly some information or inference not existing previously has swayed a majority of the Commission to adopt the Report and Order.

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I believe the Commission should decide cases from the established record, rather than attempt to strengthen a weak case after the evidentiary hearing has concluded and briefs have been submitted. If a proceeding such as the one in this case is not technically a violation of due process, it certainly gives the appearance that the Commission is more interested in obtaining a desired result than in being an impartial administrative tribunal.

Furthermore, the Commission has erred in disclosing some information in the Report and Order adopted today that was previously designated as confidential. The disclosure of the identity of customers served by Omega while it was operating as an affiliated marketing company, that are not in the public record, does not serve a governmental interest and sets a dangerous Commission precedent of disclosing confidential information of regulated entities at our whim.

On June 22, 2006, the Commission issued a Protective Order at the request of Staff. The Commission at that time found legal justification in protecting the confidential information to be presented in the course of the case. Until the Report and Order, all information considered confidential in this case has been protected from disclosure to the public by means of in-camera proceedings and closed filings.

Following the Commission's August 7, 2007 Order regarding disclosure of the confidential information, Omega correctly pointed out in its August 13, 2007 letter to Judge Woodruff "there is [not] a compelling reason to disclose this information because it would not appear to be relevant to the question of what Omega was paying MPC/MGC for natural gas transportation service." Staff in its Response, agrees that "actual names of the customers may not be particularly relevant to the issue. The letters A, B, and C were used during portions of the hearing to distinguish the customers that had been designated by MPC/MGC as highly confidential. This approach would still provide enough detail for the public to differentiate between the customers without disclosing the actual names." For these reasons, I do not support today's vote to adopt the Report and Order.

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**The Staff of the Missouri Public Service Commission, Complainant, v.
Suburban Water and Sewer Company, Respondent.**

Case No. WC-2007-0452 et al.

Decided: August 28, 2007

Water §3. The Commission ordered that no later than November 1, 2007, Suburban Water and Sewer Company will prepare and distribute a brochure detailing the rights and responsibilities of the utility and its customers that is acceptable to Staff.

REPORT AND ORDER

Appearances

Shelley E. Syler Brueggemann, Senior Counsel, and **Steven C. Reed**, Litigation Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

Tom Harrison and Matthew Volkert, Van Matre, Harrison, and Volkert, P.C., 1103 East Broadway, Columbia, Missouri 65201, for Suburban Water and Sewer Company.

Christina Baker, Assistant Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel.

REGULATORY LAW JUDGES: Benjamin H. Lane, Regulatory Law Judge and Morris L. Woodruff, Deputy Chief Regulatory Law Judge

Syllabus: The Commission finds in favor of Staff on its Complaint and authorizes the Commission's General Counsel, pursuant to Section 386.600, RSMo 2000, to file a petition in the circuit court of his choosing to seek any applicable penalties against Suburban Water and Sewer Company for violations of Counts V, VI, VII, and VIII of Staff's Complaint.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Procedural History

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On May 29, 2007, the Staff of the Commission filed a complaint against Suburban Water and Sewer Company and Gordon Burnam. The complaint contained ten counts alleging that Suburban and Gordon Burnam, owner and president of Suburban, have violated several provisions of a disposition agreement entered into in Case No. WR-2005-0455, to resolve Suburban's request for a rate increase. That disposition agreement was approved by the Commission in an order issued on June 16, 2005.

By a notice issued on June 4, 2007, pursuant to Commission Rule 4 CSR 240-2.070(7), the Commission served a copy of Staff's complaint on Suburban and Burnam. Subsequently, on June 8, 2007, Staff filed a First Amended Complaint. The Commission notified the respondents of the filing of the amended complaint on June 11, 2007.

On May 21, 2007, the Office of the Public Counsel filed an application asking the Commission to open a case for investigation and requested that the Commission hold a local public hearing. Public Counsel was concerned about Suburban's stated intention to cease providing water service to its customers on July 1, 2007. Public Counsel's application was assigned Case No. WO-2007-0444. Acting on its own motion, on June 5, 2007, the Commission consolidated WO-2007-0444 with Staff's complaint, WC-2007-0452.

Suburban and Burnam filed timely answers on July 11, 2007. On July 24, 2007, the Commission found that it does not have jurisdiction over Gordon Burnam as an individual and granted his motion to be dismissed from Staff's complaint.

Staff asked that the Commission expedite its consideration of Staff's complaint. For that reason, an evidentiary hearing was held before the Commission on July 26 and 27, 2007. The Commission did not permit the parties to prefile testimony. Instead, all testimony was heard live at the hearing. In addition, a local public hearing was held in Columbia, Missouri, on July 23, 2007, at which the Commission heard the comments and concerns of Suburban's customers. The parties offered closing arguments at the conclusion of the evidentiary hearing. The parties did not file written briefs.

The Operations of Suburban

Suburban first received a certificate from this Commission to operate as a public water utility on April 12, 1973, in Case No. 17652.¹ Suburban was created to provide water and sewer service to BonGor Lake

¹ Staff's First Amended Complaint, Paragraph 4. Suburban admitted the truth of this paragraph in its answer.

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Estates, a residential subdivision near Columbia in Boone County, Missouri. The BonGor Lake Estates development was started by Gordon Burnam and his wife Bonnie, and, in fact, the development's name is derived from their names, Bonnie and Gordon.² The Burnams built most of the houses in the subdivision, although some were built by other builders.³ At one time, the Burnams also owned and rented out the multi-family units built in the subdivision. The Burnams sold their interest in those units in 1986.⁴

Suburban currently provides water service to 39 single-family residences, and 108 duplex and fourplex apartment units in BonGor Lake Estates.⁵ Suburban initially provided sewer service to the subdivision as well, but the sewer service was sold some years ago and is now operated by the Boone County Regional Sewer District.⁶

Gordon Burnam is president of Suburban. He and his wife are also the only shareholders and directors of Suburban.⁷ Suburban currently has no employees.⁸ Paula Belcher, a vice-president and employee of Vista Home Management Company, another company owned by the Burnams, supervises the day-to-day operations of the Suburban water system from Vista's office.⁹ The labor costs of running Suburban are billed to Suburban by Vista.¹⁰

Suburban is not a profitable company. For 2006, the company's profit and loss statement shows total revenue of \$22,994, with total operating expenses of \$37,031, for a net loss of \$14,036 for the year.¹¹ The company's balance sheet for 2006 shows total assets of \$16,175 and total liabilities of \$12,319. The Burnams must regularly inject personal funds into the company to keep it solvent.¹²

Gordon Burnam is 76 years old; his wife, Bonnie, is 73.¹³ Both have recently had open-heart surgery¹⁴ and have essentially retired to

² Transcript, Page 36, Lines 22-25.

³ Transcript, Page 39, Lines 4-6.

⁴ Transcript, Page 41, Lines 4-8.

⁵ Transcript, Page 37, Lines 1-13.

⁶ Transcript, Page 40, Lines 19-25.

⁷ Transcript, Page 36, Lines 2-15.

⁸ Transcript, Page 41, Lines 1-3.

⁹ Transcript, Page 647, Lines 8-14.

¹⁰ Transcript, Page 356, Lines 13-23.

¹¹ Exhibit 32.

¹² Transcript, Page 134, Lines 18-21.

¹³ Transcript, Page 130, Lines 1-2.

¹⁴ Transcript, Page 129, Lines 12-13.

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Florida.¹⁵ The Burnams would very much like to get out of the water business.¹⁶

On January 31, 2007, Gordon and Bonnie Burnam, as directors and shareholders of Suburban, resolved to dissolve the corporation and cease operations as of July 1, 2007.¹⁷ At that time, legal counsel for the corporation mailed a certified letter to Dale Johansen, the head of the Commission's water and sewer department, describing Suburban's decision to dissolve and cease operations.¹⁸ The certified mail receipt shows that Shawn Watson signed for the letter. Shawn Watson is not, however, an employee of the Commission and Dale Johansen testified that he did not receive the letter at the time it was sent.¹⁹

On March 30, 2007, Suburban sent a letter to its customers informing them that the company would cease operations on July 1, 2007, and that their water service would be "shut off, indefinitely," at that time.²⁰ That shut-off letter caused consternation among Suburban's customers and brought Suburban's situation to the attention of Staff and the Public Counsel. Staff responded by filing this complaint for penalties, and by filing an action for an injunction in the Circuit Court of Boone County. On June 25, 2007, Gordon and Bonnie Burnam, as directors and shareholders of Suburban, resolved to postpone the dissolution of Suburban.²¹ Four days later, on June 29, the Circuit Court issued a preliminary injunction, ordering the defendants, Gordon Burnam and Suburban, to "continue to provide safe and adequate supply of water to Bon Gor Estates pending approval of any changes by Mo Public Service Commission."²²

Although Suburban's attempt to discontinue service on July 1, 2007, is an underlying current throughout this proceeding, it is not the basis for the complaint that is before the Commission. Rather, Staff's complaint is based on Suburban's failure to comply with the requirements of a 2005 disposition agreement that formed the basis for resolution of Suburban's request for a rate increase.

Suburban initially requested a rate increase in a letter sent to the Commission on December 1, 2004. Thereafter, following the procedures

¹⁵ Transcript, Page 123, Lines 2-3.

¹⁶ Transcript, Page 126, lines 22-23.

¹⁷ The corporate documents describing that decision are Exhibits 18 and 19.

¹⁸ The letter is Exhibit 34.

¹⁹ Transcript, Page 568, Lines 9-13.

²⁰ The letter is Exhibit 15.

²¹ The corporate documents describing that decision are Exhibits 16 and 17.

²² 13th Judicial Circuit Case No. 07BA-CV02632 – Missouri Public Service v. Suburban Water et al. Docket Entry June 29, 2007.

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established in the Commission's rule regarding rate increases requested by small water utilities,²³ the Commission's Staff conducted an extensive review of the operations and expenses of Suburban.²⁴ Ultimately, Staff and the Public Counsel entered into a disposition agreement with Suburban. Gordon Burnam signed that agreement on behalf of Suburban on May 26, 2005. In that document, the three signatory parties agreed to terms by which Suburban's request for a rate increase should be resolved.²⁵ The Commission approved that disposition agreement in an order issued in Case No. WR-2005-0455, on June 16, 2005, effective June 30, 2005.²⁶ In that order, the Commission directed Suburban to "comply with the terms of the Agreement Regarding Disposition of Small Company Rate Increase Request."²⁷

Suburban had requested a \$7,000 increase in its annual revenues. The disposition agreement provided for an annual revenue increase of \$4,192. It also set out sixteen specific, numbered, paragraphs, some of which describe actions that Suburban would be required to take to improve the operation of its water system. Staff's complaint alleges that Suburban failed to comply with eight of those paragraphs.

The Allegations of Staff's Complaint

Count I and Count II

Staff's First Amended Complaint alleged that Suburban violated paragraphs (6) and (7) of the disposition agreement by failing to refund certain customer deposits and overcharges. Subsequently, Staff dismissed Count II in a pleading filed on July 11. Staff dismissed Count I at the hearing.²⁸ Since Counts I and II have been dismissed, the Commission will not further address them in this report and order.

Count III

In Count III, Staff alleges that Suburban failed to comply with paragraph (8) of the disposition agreement. Paragraph (8) provides as follows:

That the Company will develop and distribute to all customers a brochure detailing the rights and responsibilities of the utility and its customers.

²³ Commission Rule 4 CSR 240-3.635.

²⁴ Transcript, Page 537, Lines 6-17.

²⁵ The disposition agreement is Exhibit 55.

²⁶ Exhibit 2.

²⁷ Id.

²⁸ Transcript, Page 32, Lines 4-5.

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Staff's chief witness regarding Count III was Debbie Bernsen, a Management Utility Analyst III for the Commission.²⁹ Bernsen explained that Commission Rule 4 CSR 240-13.040(3) requires a utility to prepare a brochure, describing, in layman's terms, the rights and responsibilities of the utility and its customers under the Commission's regulations.³⁰ Suburban should have prepared the brochure required by the regulation thirty years ago when the rule went into effect.³¹ When, during the course of her review of Suburban for the 2005 rate increase, she noticed that the company did not have such a brochure, she added a requirement for the company to prepare such a document to the disposition agreement.³² Although this paragraph of the disposition agreement does not include a specific deadline for Suburban to complete the task, Bernsen testified that in her opinion, a utility could prepare a brochure meeting the requirements of the rule in a few hours using a simple word processor.³³

Suburban finally prepared a brochure describing the rights of its customers in June 2007, and distributed that brochure to its customers.³⁴ Bernsen testified that Suburban's brochure did not meet all the enumerated requirements of the Commission's regulation, and on that basis concluded that the June 2007 brochure does not meet the requirements of the Commission's rule or the disposition agreement.³⁵ Staff has not contacted Suburban to advise it of the deficiencies in its brochure because of the pending litigation between Staff and Suburban.³⁶

Count IV

Count IV of Staff's complaint alleges that Suburban failed to comply with paragraph (9) of the disposition agreement. That paragraph provides as follows:

That the Company will develop a continuous property record system for plant that at a minimum includes the date plant is placed in service, the purchase price of plant and the dates of retirement of property.

²⁹ Transcript, Page 300, Lines 9-11.

³⁰ Transcript, Page 303, Lines 9-13.

³¹ Transcript, Page 307, Lines 20-25.

³² Transcript, Page 303, Lines 18-22.

³³ Transcript, Page 315, Lines 10-23.

³⁴ Suburban's brochure is Exhibit 6.

³⁵ Transcript, Page 316, Lines 7-16.

³⁶ Transcript, Page 553, Lines 7-23.

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Staff's chief witness regarding Count IV was Kofi Boateng Agyenim, a utility regulatory auditor III for the Commission.³⁷ Boateng testified that a continuous property records system is a procedure by which the costs of utility plant is segregated and maintained by units of plant. He explained that such a method of bookkeeping provides a great deal of useful information when the company's records are being reviewed.³⁸ Boateng acknowledged that the continuous property records system he described is not defined by any Commission regulation.³⁹ Although this paragraph of the disposition agreement does not include a specific deadline for Suburban to complete the task, Boateng testified that Suburban should have been able to put together a continuous property records system in a day or two.⁴⁰

On July 9, 2007, after Staff filed its complaint, Suburban provided Staff with what it described as a continuous property records system.⁴¹ Suburban's property records system includes the dates the plant was placed in service, the purchase price of the plant, and the dates the plant is expected to be retired, which is the specific information described in paragraph (9) of the disposition agreement. Boateng, however, testified that the property records system submitted by Suburban was not sufficient because it is not continuous in that it does not include interim costs incurred regarding the plant during its life.⁴²

Count V

Count V of Staff's complaint alleges that Suburban failed to comply with the requirement of the tenth paragraph of the disposition agreement.⁴³ That paragraph provides as follows:

That the Company will install meters for all buildings no later than August 31, 2005.

Staff's chief witness regarding Count V was Martin Hummel. Hummel is an engineer and a certified water operator, employed by the Commission since 1989.⁴⁴ Hummel inspected Suburban's water system as part of the investigation in the 2005 rate case. At that time, he noted that water service

³⁷ Transcript, Page 342, Lines 3-5.

³⁸ Transcript, Page 344, Lines 2-14.

³⁹ Transcript, Page 366, Lines 21-24.

⁴⁰ Transcript, Page 349, Lines 6-15.

⁴¹ Transcript, Page 346, Lines 7-9. Suburban's submitted property record system is Exhibit 3.

⁴² Transcript, Pages 348-349, Lines 18-25, 1-5.

⁴³ The tenth and eleventh paragraphs of the disposition agreement are not numbered. But there are two requirements described between paragraph (9) and (12), so they will be identified as paragraphs 10 and 11.

⁴⁴ Transcript, Page 376-377, Lines 23-25, 1-7.

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to several buildings was not metered. In response, he added the meter requirement to the disposition agreement.⁴⁵ He inspected Suburban's system again after Staff filed this complaint, and confirmed that three buildings still do not have meters or meter boxes. He also found a number of buildings that have a meter box, but do not have a meter.⁴⁶ Hummel also clarified that this provision required Suburban to install meters to all buildings, not necessarily to all customers within a building.⁴⁷ In his testimony, Gordon Burnam confirmed that Suburban has not installed meters on all buildings as required by this paragraph of the disposition agreement.⁴⁸

The installation of meters for all customers is vitally important because without customer meters, Suburban has no means to determine how much water is flowing to its customers, and how much is being lost to leaks on the system. Until Suburban can determine how much water is flowing through its system and how much is being lost along the way, it cannot reasonably evaluate any other repairs that may need to be made to that system.⁴⁹ Furthermore, without meters in place to allow a proper evaluation of the water system, it will be difficult for Suburban to find another entity willing to purchase its system.

Count VI

Count VI of Staff's complaint alleges that Suburban failed to comply with the requirement of the eleventh paragraph of the disposition agreement. That paragraph provides as follows:

That the Company will implement a ten year replacement program for existing meters.

Staff's chief witness regarding Count VI was again Martin Hummel. Hummel described a ten-year meter replacement program as a company prescribed procedure that would ensure that all customers' meters are either no more than ten years old, or that a meter more than ten years old has been tested to ensure that it is properly calibrated and working properly.⁵⁰ The Commission's rule regarding the testing and replacement of customer meters requires that a meter either be replaced or tested every

⁴⁵ Transcript, Page 379, Lines 16-21.

⁴⁶ Transcript, Page 386, Lines 22-25.

⁴⁷ Transcript, Page 462, Lines 3-10.

⁴⁸ Transcript, Page 50, Lines 4-6.

⁴⁹ Transcript, Page 458, Lines 17-20.

⁵⁰ Transcript, Page 389, Lines 2-10.

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ten years.⁵¹ Since it costs less to replace a meter than to have a meter removed and tested, most small companies simply replace their old meters.⁵² Normally, a company using a ten-year meter replacement program would replace ten percent of its meters each year. Hummel testified that Suburban could have implemented a ten-year meter replacement program in six weeks.⁵³

Suburban claims that it has a ten-year meter replacement program. Suburban indicates its plan is to immediately replace any meters that fail. All other meters are to be replaced within ten years.⁵⁴ Suburban has not actually taken any steps to determine the age of its meters and to set up a schedule for testing the meters.⁵⁵ Gordon Burnam, concedes that Suburban has not implemented an actual plan to replace meters.⁵⁶

Count VII

Count VII of Staff's complaint alleges that Suburban failed to comply with the requirement of paragraph (12) of the disposition agreement. That paragraph provides as follows:

That the Company will install flush valves with the flushing capability of at least 3 feet per second in all mains.

Staff's witness, Everett Baker, an environmental engineer for DNR, explains that flush valves are necessary to allow a water company to remove contamination from the system. Suburban currently has only one flush valve on its system and that is not enough to properly flush its system.⁵⁷ Dale Johansen, manager of the Commission's water and sewer department, testified that Suburban would need to hire an engineer to evaluate its water system to determine where the additional flush valves should be placed. Suburban might also need to obtain a construction permit from DNR before adding the valves to its mains. Based on those factors, Johansen estimated that it would take approximately one year for Suburban to install the needed flush valves.⁵⁸

⁵¹ Commission Rule 4 CSR 240-10.030(38)(A).

⁵² Transcript, Pages 501-502, Lines 17-25, 1-19.

⁵³ Transcript, Page 393, Lines 9-18.

⁵⁴ Transcript, Pages 658-659, Lines 23-25, 1.

⁵⁵ Transcript, Page 659, Lines 15-23.

⁵⁶ Transcript, Page 50, Lines 7-21, and Page 92, Lines 9-21.

⁵⁷ Transcript, Pages 230-231, Lines 7-25, 1-23.

⁵⁸ Transcript, Pages 504-505, Lines 5-25, 1-7.

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Gordon Burnam concedes that flush valves are needed, and indicates it would cost approximately \$6,000 to install the valves.⁵⁹ However, Suburban has not installed any additional valves.⁶⁰

Count VIII

Count VIII of Staff's complaint alleges that Suburban has failed to comply with the requirement of paragraph (13) of the disposition agreement. That paragraph provides as follows:

That the Company will replace the standpipe with an inlet high enough to provide adequate circulation and detention time.

Staff's witness, Everett Baker explained that Suburban's standpipe, used to store pumped water before it is distributed through the system to customers, is in poor condition. A number of leaks from the standpipe have been patched and that likely means that the interior of the standpipe is severely pitted. That means the standpipe likely needs to be entirely replaced.⁶¹

The requirement found in the disposition agreement does not, however, necessarily require Suburban to replace the entire standpipe. If the standpipe were found to be repairable, the requirement would be satisfied if the inlet inside the existing standpipe were raised.⁶² However, Staff contemplated that the entire standpipe would need to be replaced.⁶³ Staff estimated that it would take Suburban at least eight months, to replace the standpipe.⁶⁴

The importance of raising the inlet was explained by Everett Baker. If the inlet to the standpipe is too close to the outlet, water will not be retained in the standpipe for a sufficient amount of time. Instead, the water will "short-circuit" by shooting straight from the inlet to the outlet in a matter of seconds.⁶⁵ If the water is not retained in the standpipe for a sufficient period, the chlorination of the water does not have time to take effect. Not only does that present a health risk, but it also contributes to a rotten-egg smell caused by hydrogen sulfide that has been noted by Suburban's

⁵⁹ Transcript, Page 15, Lines 18-20.

⁶⁰ Transcript, Pages 50-51, Lines 22-25, 1.

⁶¹ Transcript, Pages 221-222, Lines 9-25, 1-7.

⁶² Transcript, Page 506, Lines 4-6.

⁶³ Transcript, Page 398, Lines 10-23.

⁶⁴ Transcript, Page 400, Lines 14-19.

⁶⁵ Transcript, Page 240, Lines 11-18.

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customers. Chlorine neutralizes the hydrogen sulfide smell, but if the water is not retained long enough for the chlorine to act, the water will stink.⁶⁶

Suburban has not raised the standpipe inlet, nor has it replaced the entire standpipe.⁶⁷ In its defense, Suburban explains that it will cost \$100,000 to \$110,000 to replace the standpipe.⁶⁸

Count IX

Count IX of Staff's complaint alleges that Suburban failed to comply with the requirement of paragraph (14) of the disposition agreement. That paragraph provides as follows:

That the Company will contract with a certified operator to maintain the Company's well and distribution system.

Suburban acknowledges that despite its efforts to find a certified operator it has not done so.⁶⁹ Staff agrees that it can be hard for a small water company to find a certified operator,⁷⁰ particularly when the water system is in poor condition. In the words of Martin Hummel, "[t]he system has to have flush valves and meters in order for it to be attractive to a certified operator; otherwise, you're not ever gonna get a certified operator."⁷¹ However, Dale Johansen, testifying for Staff, offered an opinion that Suburban should have been able to hire a certified operator in three to six months.⁷²

Count X

Count X of Staff's complaint alleges that Suburban failed to comply with the requirement of paragraph (15) of the disposition agreement. That paragraph provides as follows:

That the Company will provide quarterly reports regarding monthly customer meter usage data and monthly master meter usage data to the Auditing Staff of the Commission for the period July 1, 2005 through December 31, 2006.

Staff explained that it sought quarterly reports from Suburban so it could monitor water usage on the system to determine the company's progress in dealing with the problems identified in the rate increase case.⁷³ The first quarterly report should have been filed a month after the end of the first

⁶⁶ Transcript, Page 237, Lines 14-23.

⁶⁷ Transcript, Page 51, Lines 2-6.

⁶⁸ Transcript, Page 743, Lines 19-22.

⁶⁹ Transcript, Page 51, Lines 8-22.

⁷⁰ Transcript, Page 292, Lines 11-14.

⁷¹ Transcript, Pages 466-467, Lines 23-25, 1.

⁷² Transcript, Page 508, Lines 13-22.

⁷³ Transcript, Page 352, Lines 17-24.

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quarter of the reporting period. In this case that means the first quarterly report should have been filed by October 31, 2005.⁷⁴

Suburban provided monthly master meter usage data to Staff in June 2007, after this complaint was filed, but it did not provide customer meter usage data.⁷⁵ Gordon Burnam admitted that Suburban did not provide the quarterly reports required by the disposition agreement.⁷⁶

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law regarding Staff's complaint:

1. Suburban is a "Water Corporation" and "Public Utility," as those terms are defined at Subsections 386.020 (58) and (42), RSMo Supp. 2006. As such, it is subject to regulation by this Commission.

2. Subsection 393.140(1), RSMo 2000, gives the Commission general supervisory authority over all Missouri water corporations.

3. Subsection 393.130.1, RSMo Supp. 2006, requires every water corporation to "furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable."

4. Subsection 386.390.1, RSMo 2000, authorizes the Commission to bring a complaint against a public utility on its own motion.

5. As the party bringing a complaint, Staff has the burden of proving its allegations.⁷⁷

6. Section 386.360.1, RSMo 2000, provides:

[w]henver the commission shall be of the opinion that a public utility, municipal gas system, person or corporation is failing or omitting or about to fail or omit to do anything required of it by law or by order or decision of the commission, or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order or decision of the commission, it shall direct the general counsel to the commission to commence an action or proceeding in any circuit court of the state of Missouri in the name of the commission for the purpose of having such violations or

⁷⁴ Transcript, Page 352, Lines 2-5.

⁷⁵ The information provided by Suburban is Exhibit 4.

⁷⁶ Transcript, Page 52, Lines 6-10.

⁷⁷ State ex rel. GS Technologies Operating Co., Inc. v. Pub. Serv. Comm'n, 116 S.W.3d 680 (Mo. App. W.D. 2003).

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threatened violations stopped and prevented either by mandamus or injunctions.

7. Section 386.570.1, RSMo 2000, provides that any public utility that fails to comply with any provision of law, or with any "order, decision, decree, rule, direction, demand or requirement" of the Commission "is subject to a penalty of not less than one hundred dollars nor more than two thousand dollars for each offense."

8. The General Counsel of the Commission is authorized by Section 386.600, RSMo 2000, to bring an action in circuit court to recover a penalty against a public utility.

9. Commission Rule 4 CSR 240-13.040(3) provides as follows:

A utility shall prepare, in written form, information which in layman's terms summarizes the rights and responsibilities of the utility and its customers in accordance with this chapter. The form shall be submitted to the consumer services department of the Missouri Public Service Commission, and to the Office of the Public Counsel. This written information shall be displayed prominently, and shall be available at all utility office locations open to the general public, and shall be mailed or otherwise delivered to each residential customer of the utility if requested by the customer. The information shall be delivered or mailed to each new customer of the utility upon commencement of service and shall be available at all times upon request. The written information shall indicate conspicuously that it is being provided in accordance with the rules of the commission, and shall contain information concerning, but not limited to:

- (A) Billing and estimated billing procedures;
- (B) Methods for customer verification of billing accuracy;
- (C) Customer payment requirements and procedures;
- (D) Deposit and guarantee requirements;
- (E) Conditions of termination, discontinuance and reconnection of service;
- (F) Procedures for handling inquiries;
- (G) Explanation of meter reading procedures which would enable a customer to read his/her own meter;

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(H) A procedure where a customer may avoid discontinuance of service during a period of absence;

(I) Complaint procedures under 4 CSR 240-2.070;

(J) The telephone number and address of a customer services office of the Missouri Public Service Commission, the commission's 800 telephone number, and the statement that the company is regulated by the Missouri Public Service Commission;

(K) The address and telephone number of the Office of Public Counsel and a statement of the function of that office; and

(L) If the utility is a gas distribution company, and explanation of the function of the purchase gas adjustment clause.

10. Commission Rule 4 CSR 240-10.030(38)(A) requires that customer meters of the type used by Suburban be tested for accuracy once every ten years.

11. Other than the requirement that meters be installed no later than August 31, 2005, which is described in Count V of Staff's complaint, none of the requirements that Staff is attempting to enforce contain a specific deadline for their completion. In the absence of a specific deadline, Staff asks the Commission to impose a reasonable time limit for the completion of these tasks. In support of that position, Staff cites contract law for the proposition that when no time is specified in an agreement, "performance must be made within a reasonable time."⁷⁸

The Commission is not attempting to enforce any sort of contract between Staff and Suburban, but the analogy proposed by Staff is sound. When the disposition agreement between Staff, Public Counsel, and Suburban was approved by the Commission, and the Commission ordered Suburban to comply with its terms, that agreement effectively became an order of the Commission. Staff's complaint therefore asks the Commission to enforce an order of the Commission. While the Commission's order does not contain specific deadlines for compliance, it is apparent that the Commission did not expect Suburban to comply with that order whenever it got around to it. The Commission expected Suburban to obey its order within a reasonable time.

⁷⁸ *Millington v. Masters*, 96 S.W.3d 822 (Mo. App. S.D. 2002).

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DECISION

In deciding this case, the Commission will address each of the remaining counts in Staff's complaint. The Commission will then determine whether Staff should be authorized to proceed to circuit court to seek monetary penalties and relief through mandamus or injunction for any violations of the Commission's order.

Count III

Suburban failed to produce any sort of brochure for two years after it was ordered to do so in the Commission's June 16, 2005 order. When it did finally produce a brochure in June 2007, that brochure failed to contain the information explicitly required by the Commission's rule, a rule to which Suburban has been subject for many years. Suburban could reasonably have complied with this requirement soon after the June 30, 2005 effective date of the Commission's Order accepting the disposition agreement. In any event, any reasonable interpretation of the disposition agreement would find Suburban should have complied with this requirement long ago.

However, Suburban has at least attempted to comply with this requirement. It would not be appropriate to seek a penalty against Suburban for its delay in complying with this requirement. Instead, the Commission will direct Suburban to work with Staff to improve its customer brochure. The Commission will order Suburban to complete and distribute its new brochure by November 1, 2007.

Count IV

Suburban failed to produce any sort of continuous property record system for two years after it was ordered to do so in the Commission's June 16, 2005 order. When it did finally produce the required information in June 2007, that information failed to meet the expectations of Staff. Suburban could reasonably have complied with this requirement soon after the June 30, 2005 effective date of the Commission's Order accepting the disposition agreement. In any event, any reasonable interpretation of the disposition agreement would find Suburban should have complied with this requirement long ago.

However, while the information produced by Suburban is not what Staff expected, it does meet the explicit minimum requirements set out in the disposition agreement. Suburban was late in complying with the requirement, but its delay is not so egregious as to justify the imposition of monetary penalties.

Count V

Suburban was required to install meters for all buildings no later than August 31, 2005. It did not do so by August 31, 2005, and it had not

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done so at the time of the hearing nearly two years later. This is a key requirement and Staff will be authorized to seek penalties and relief through mandamus or injunction for Suburban's failure to comply.

Count VI

Suburban was required to implement a ten-year replacement program to ensure that its customer meters are checked at least once every ten years to ensure that they are operating properly. Suburban could reasonably have complied with this requirement soon after the June 30, 2005 effective date of the Commission's Order accepting the disposition agreement. In any event, any reasonable interpretation of the disposition agreement would find Suburban should have complied with this requirement long ago.

Suburban's claim that its ten-year plan simply puts off for ten years the replacement of customer meters that have not obviously failed is an insult to the Commission. The Commission's rule requires all customer meters to be tested at least once every ten years. Many of Suburban's meters may already be more than ten years old. Suburban professes not to know the age of its meters. Delaying testing or replacement of those meters for another ten years will simply push Suburban further out of compliance with the Commission's rule. Staff will be authorized to seek penalties and relief through mandamus or injunction for the violation of this provision of the disposition agreement.

Count VII

Suburban was required to install additional flush valves on its mains. Suburban could reasonably have complied with this requirement soon after the June 30, 2005 effective date of the Commission's Order accepting the disposition agreement. In any event, any reasonable interpretation of the disposition agreement would find Suburban should have complied with this requirement long ago. It did not do so. This is a key requirement and Staff will be authorized to seek penalties and relief through mandamus or injunction for Suburban's failure to comply.

Count VIII

Suburban was required to replace the standpipe with an inlet high enough to provide adequate circulation and detention time. Whether Suburban chose to replace the entire standpipe or just the inlet within the standpipe, it could reasonably have complied with this requirement. Suburban could reasonably have complied with this requirement soon after the June 30, 2005 effective date of the Commission's Order accepting the disposition agreement. In any event, any reasonable interpretation of the disposition agreement would find Suburban should have complied with this

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requirement long ago. It did not do so. The fact that the repairs will be expensive does not excuse non-compliance with a requirement that is essential to the provision of safe and adequate service to Suburban's customers. This is a key requirement and Staff will be authorized to seek penalties and relief through mandamus or injunction for Suburban's failure to comply.

Count IX

Suburban was required to contract with a certified operator to maintain its well and distribution system. Despite reasonable efforts to either hire a certified operator or train an existing employee to fill that role, Suburban has thus far been unable to hire a certified operator. As acknowledged by Staff's witness, Suburban is unlikely to be able to find a certified operator willing to take responsibility for its system until it takes other steps to improve that system. Under the circumstances, it would be unreasonable to seek monetary penalties against Suburban for its failure to find a certified operator willing to operate its system.

Count X

Suburban was required to provide quarterly reports to Staff regarding monthly customer meter usage data and monthly master meter usage data. The first such quarterly report should reasonably have been provided to Staff by October 31, 2005. Suburban did not provide those reports.

Suburban should have complied with this requirement, but the filing of quarterly report will not have a direct impact on the quality of service provided to Suburban's customers. Therefore, Suburban's violation of this requirement is not so egregious as to justify the imposition of monetary penalties; however, Staff will be authorized to seek relief through mandamus or injunction for Suburban's failure to comply.

The Pursuit of Penalties in Circuit Court

The Commission is troubled by this case. The Commission will authorize its Staff to proceed to circuit court to seek monetary penalties and mandamus or injunction against Suburban because there does not seem to be any other means available to try to force that company to properly maintain its system and offer safe and adequate service to its customers. Nevertheless, the Commission does not believe that the imposition of monetary penalties against Suburban, a financially troubled company, will be a magic bullet to cure the problems facing this water system and other similarly situated systems in this state. Therefore, the Commission will direct its Staff to redouble its efforts to work with financially troubled small

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water and sewer systems to try to avoid problems like those now facing Suburban.

Public Counsel's Application in Case No. WO-2007-0444

Public Counsel's Application in Case No. WO-2007-0444 merely asks the Commission to open a case to facilitate an investigation regarding Suburban's plan to cease operations, and to hold a local public hearing. Both requests have been granted and no further relief is appropriate.

IT IS ORDERED THAT:

1. Staff proved the allegations contained in Counts III, IV, V, VI, VII, VIII, IX, and X of its complaint.
2. No later than November 1, 2007, Suburban Water and Sewer Company shall prepare and distribute a brochure detailing the rights and responsibilities of the utility and its customers that is acceptable to Staff.
3. The Commission's General Counsel is authorized, pursuant to Section 386.600, RSMo 2000, to file a petition in the circuit court of his choosing to seek any applicable penalties against Suburban Water and Sewer Company for violations of Counts V, VI, VII and VIII.
4. The Commission's General Counsel is authorized, pursuant to Section 386.360, RSMo 2000, to file a petition in the circuit court of his choosing to seek a writ of mandamus or injunction against Suburban Water and Sewer Company for violations of Counts V, VI, VII, VIII and X.
5. This Report and Order shall become effective on September 7, 2007.

Davis, Chm., Murray, Gaw, Clayton, and Appling, CC., concur and certify compliance with the provisions of Section 536.080, RSMo 2000.

NOTE: See page 358 for another order in this case.

THE EMPIRE DISTRICT ELECTRIC COMPANY

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**In the Matter of The Empire District Electric Company's Application for
Variance and Clarification Concerning Select Provisions of
Commission Rules Related to Electric Utility Resource Planning.**

*Case No. EE-2008-0025
Decided: August 30, 2007*

Electric §1. The Commission ordered that Empire District Electric Company's request for waivers from certain portions of the Commission's Integrated Resource Planning rules would be granted and the approval of the waivers requested was granted for this case only and shall not be taken as a general waiver of any aspect of the rule in any future proceeding.

**ORDER GRANTING THE EMPIRE DISTRICT ELECTRIC COMPANY'S
REQUEST FOR WAIVERS**

On July 23, 2007, The Empire District Electric Company asked the Commission to grant it variances from certain requirements of the Commission's Integrated Resource Planning (IRP) Rule, 4 CSR 240-22. Empire also seeks clarification of other requirements of that rule. The IRP rule requires investor-owned electric utilities, such as Empire, to file a written plan in which it considers all options, including demand side efficiency and energy management measures, so as to provide safe, reliable, and efficient electric service to the public at reasonable rates, in a manner that serves the public interest. Empire must file its next IRP in September 2007.

Since the Commission's decision whether to grant the variances requested by Empire may affect the substance of Empire's IRP filing, the Commission provided notice of the request for variances to all parties to Empire's most recent rate case, as well as to the media and members of the General Assembly representing Empire's service area. The Commission also established August 9 as the deadline for the submission of applications to intervene.

The Missouri Department of Natural Resources (DNR) applied to intervene on August 8. The Commission granted DNR's application on August 17. No other party asked to intervene.

The Commission also ordered that any party wishing to respond to Empire's application for variances and clarification do so no later than August 20. The Commission's Staff and DNR filed timely responses. Those responses generally support Empire's positions, but ask the Commission to impose some additional requirements on Empire. On

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August 23, Empire replied to Staff and DNR, indicating its acceptance of the additional requirements.

The Commission's IRP Rule is highly detailed and technical. The requested variances and clarifications are also highly detailed and technical. Since no party objects to the requested variances and clarifications, they will not be described in detail in this order. However, the specific variances and clarifications that Empire seeks are described in Appendix A, which was attached to Empire's Application.

Staff's response asked the Commission to clearly indicate that its approval of the waivers requested by Empire are granted for this case only, and are not to be taken as a general waiver of any aspect of the rule in any future proceeding. Staff also indicated that Empire must document its decision making process regarding the areas in which it sought clarification when it files its IRP. Staff will review Empire's documentation after it is filed. Empire has agreed to do as Staff requests.

DNR's response asks the Commission to require Empire to provide details of its load analysis and forecasting models as soon as practicable before filing its IRP. Similarly, DNR asks that Empire be required to provide details of its plans for market research as soon as practicable. Empire agreed to provide the requested details as soon as practicable.

IT IS ORDERED THAT:

1. The Empire District Electric Company's request for waivers from certain portions of the Commission's Integrated Resource Planning rules is granted. The specific portions of the rule that are waived are described in Appendix A, which is attached to this order.

2. The Commission's approval of the waivers requested by The Empire District Electric Company is granted for this case only, and shall not to be taken as a general waiver of any aspect of the rule in any future proceeding.

3. This order shall become effective on September 9, 2007.

Davis, Chm., Murray and Appling, CC., concur.
Gaw and Clayton, CC., dissent

Woodruff, Deputy Chief Regulatory Law Judge

INTERSTATE POWER AND LIGHT COMPANY

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In the Matter of the Application of Interstate Power and Light Company, f/k/a IES Utilities, Inc., and ITC Midwest, LLC for Approval to Transfer Certificate of Convenience and Necessity and Transmission Line Facilities in Clark County, Missouri and Motion for Expedited Treatment

*Case No. EO-2007-0485
Decided: August 30, 2007*

Electric §3. The Commission granted a certificate of public convenience and necessity to, own, operate, and maintain a 161 kV transmission line in only the portion of Clark County, Missouri, described in its application.

**ORDER GRANTING CERTIFICATE OF CONVENIENCE
AND NECESSITY. GRANTING VARIANCES FROM CERTAIN
COMMISSION RULES. AND AUTHORIZING SALE OF ASSETS**

Syllabus:

This order authorizes Interstate Power and Light Company to transfer to ITC Midwest LLC its high-voltage transmission line assets in Clark County, Missouri, grants ITC Midwest LLC a certificate of convenience and necessity to operate those assets, and grants ITC Midwest LLC variances from Commission Rules 4 CSR 240-3.175 and 4 CSR 240-3.190(1) and (3).

Procedural History:

On June 15, 2007, Interstate Power and Light Company (IPL), f/k/a IES Utilities, Inc., and ITC Midwest LLC (ITC) asked the Commission to transfer a certificate of convenience and necessity from IPL to ITC. The applicants ask that the Commission approve this application no later than September 1, 2007.

The Commission issued an Order and Notice on June 19. In that Order and Notice, the Commission directed interested parties to file applications to intervene no later than July 9. Union Electric Company, d/b/a AmerenUE, filed a timely request to intervene, which the Commission granted.

On August 17, the Staff of the Commission filed its Recommendation. Staff recommends that the Commission grant the applicants authority to transfer the assets, grant ITC a certificate of convenience and necessity, and grant ITC variances from certain reporting requirements that would otherwise be required by Commission rule.

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Commission Rule 4 CSR 240-2.080(15) allows parties ten days to respond to pleadings. No party responded to Staff's Recommendation.

Findings of Fact:

The Commission, upon review of the parties' verified pleadings, which are admitted into evidence, makes the following findings of fact:

IPL is an Iowa corporation. IPL is a subsidiary of Alliant Energy Corporation, and is a public utility in Iowa, Minnesota and Illinois. Due to a recent sale of its Illinois electric and natural gas distribution systems, IPL no longer has any retail customers in Illinois.

ITC is a Michigan limited liability company, and a wholly owned subsidiary of ITC Holdings Corp. ITC was organized to acquire the high voltage electric transmission assets of IPL, a small portion of which are located in Clark County, Missouri.

ITC wishes to purchase approximately 9.5 miles of a 161 kV transmission line in Clark County, which connects IPL's transmission system in Keokuk, Iowa with Ameren's transmission system near Wayland, Missouri. IPL currently has a certificate of convenience and necessity for that 9.5-mile section of line.¹ No tax impact on the tax revenues of the political subdivisions in which IPL's assets are located will occur. No Missouri retail customers are served by the transmission assets that the applicants propose to transfer.

Staff recommends that the Commission grant the requested authority. Staff believes that the proposed service is not detrimental to the public interest because the line serves no Missouri retail customers, and because ITC has the managerial and technical capability to own, operate and maintain the line. Staff recommends that the Commission condition ITC's authority to purchase the transmission line upon ITC's receipt of a certificate authorizing it to conduct business in Missouri from the Missouri Secretary of State.

Moreover, Staff further recommends that the Commission waive certain reporting requirements for ITC. Staff states that because ITC will have no Missouri retail customers, no purpose would be served by having ITC file depreciation studies and power plant information, so long as ITC continues to not have Missouri retail customers.

Conclusions of Law:

¹ Commission Case No. EA-2002-296, Order Granting Certificate of Public Convenience and Necessity (April 18, 2002).

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IPL and ITC are “electrical corporations” and “public utilities.”² They are subject to the jurisdiction of this Commission under to Chapters 386 and 393, RSMo 2000.

Before ITC may acquire the transmission line in Clark County, Missouri, the Commission must first authorize ITC to do so.³ The Commission will authorize the transaction if it is not detrimental in the public interest to do so.⁴ ITC has the managerial, financial and technical resources to own, operate and maintain that line.⁵ Therefore, the Commission concludes that ITC’s ownership, operation and maintenance of that line would not be detrimental to the public interest.

An electrical corporation may not exercise any right under a franchise without first obtaining the permission and approval of this Commission.⁶ The Commission may give permission and approval when it has determined that such construction or the exercise of such right under a franchise is “necessary or convenient for the public service.”⁷ The statute requires the Commission to provide “due hearing; however, no requests for intervention have been received and no party has requested a hearing. The requirement for a hearing is met when the opportunity for hearing has been provided and no proper party has requested the opportunity to present evidence. Since no one has requested a hearing, the Commission may grant the relief requested based on the verified application.”⁸

The Commission may also impose such conditions as it deems reasonable and necessary upon its grant of permission and approval.⁹

The Commission concludes that ITC’s ownership of the proposed transmission line is both necessary and convenient for the public service because by owning that line, ITC will continue to serve customers in the Keokuk, Iowa area that IPL currently serves. Therefore, the Commission will authorize ITC to purchase, own, operate, and maintain the transmission line as described by its application. However, the Commission will condition the certificate upon ITC’s receipt and filing of a certificate to conduct business in Missouri as a foreign corporation from the Missouri Secretary of State.

² Section 386.020(15), (42), Cum. Supp. 2006.

³ Section 393.190, RSMo 2000.

⁴ Commission Rule 4 CSR 240-3.110(1)(D).

⁵ See *Staff Recommendation, App. A* (filed August 17, 2007).

⁶ Sections 393.170.1 and 2, RSMo 2000.

⁷ Section 393.170.3, RSMo 2000.

⁸ *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App., W.D. 1989).

⁹ Section 393.170.3, RSMo 2000.

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Further, because ITC will have no Missouri retail customers, the Commission will waive the requirement in Commission Rule 4 CSR 240-3.175 that would otherwise require ITC to file depreciation studies with the Commission. Finally, the Commission will also waive the fuel and outage reporting requirements in Commission Rule 4 CSR 240-3.190(1) and (3).

IT IS ORDERED THAT:

1. ITC Midwest LLC is granted a certificate of public convenience and necessity to, own, operate, and maintain a 161 kV transmission line in only the portion of Clark County, Missouri, described in its application.

2. ITC Midwest LLC is granted authority to purchase from Interstate Power and Light Company the transmission line and any accompanying assets referenced in paragraph 1 and described in its application.

3. The certificate of convenience and necessity referenced in ordered paragraph 1 shall become effective on the effective date of this order, except as otherwise provided in paragraph 4.

4. The authority granted to ITC Midwest LLC in this order is conditioned upon ITC Midwest LLC obtaining a certificate to do business as a foreign corporation in Missouri from the Missouri Secretary of State, and filing a certified copy of that certificate with the Commission.

5. The Commission grants ITC Midwest LLC a waiver from the reporting requirements of Commission Rule 4 CSR 240-3.175 and 3.190(1), (3):

6. Nothing in this order shall be considered a finding by the Commission of the reasonableness or prudence of the expenditures herein involved, nor of the value for ratemaking purposes of the properties herein involved, nor as an acquiescence in the value placed on said property.

7. The Commission reserves the right to consider the ratemaking treatment to be afforded the properties herein involved, and the resulting cost of capital, in any later proceeding.

8. This order shall become effective on September 7, 2007.

9. This case shall be closed on September 8, 2007.

Davis, Chm., Murray, Gaw, Clayton,
and Appling, CC., concur.

Pridgin, Senior Regulatory Law Judge

CENTURYTEL BROADBAND SERVICES, LLC

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**In the Matter of the Application of CenturyTel Broadband Services,
LLC for Video Service Authorization**

Case No. KA-2008-0058

Decided: August 31, 2007

Telecommunications §1. The Commission began authorizing video service pursuant to Section 67.2679.7 RSMo 2000 (Cum. Supp. 2007). This order was the first issued by the Commission authorizing CenturyTel to provide video service for the City of Columbia, Missouri.

VIDEO SERVICE AUTHORIZATION

On August 28, 2007, CenturyTel Broadband Services, LLC, ("the Company") pursuant to §67.2679.7 RSMo 2000 (Cum. Supp. 2007), filed an application for video service authorization in the City of Columbia, Missouri and requested that its application be expedited so that authorization is issued within seven days. The City of Columbia has notified the Commission in writing that it is aware of both the application and the request to expedite.

The Commission has reviewed the application filed by the Company and finds that it and the attached affidavit comply with the filing requirements set forth in § 67.2679.7 RSMo 2000 (Cum. Supp. 2007).

IT IS ORDERED THAT:

1. The Company is granted authority to provide video service in the franchise area of each political subdivision set forth in the application and restated above; and
2. The Company is granted authority to construct a video service network along, across, or on public rights-of-way for the delivery of video service to the extent the video service provider or an affiliate did not otherwise possess a valid authorization to occupy the public rights-of-way.
3. This Order shall become effective on September 4, 2007.
4. This case may be closed on September 5, 2007.

Colleen M. Dale, Chief Regulatory
Law Judge, by delegation of authority pursuant
to Section 386.240, RSMo 2000.

**The Staff of the Missouri Public Service Commission, Complainant, v
Suburban Water and Sewer Company, Respondent.**

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Case No. WC-2007-0452 et al.
Decided: September 6, 2007

Evidence, Practice and Procedure §30. The Commission struck Respondent's motion that asked the Commission to approve a nonunanimous stipulation and agreement that had not been signed by any other party, finding that the motion disclosed settlement negotiations in an improper attempt to negotiate a settlement directly with the Commission.

**ORDER STRIKING SUBURBAN'S MOTION FOR NONUNANIMOUS
STIPULATION AND AGREEMENT**

On August 28, 2007, the Commission issued a Report and Order generally finding in favor of the Staff of the Commission regarding its complaint against Suburban Water and Sewer Company. The Commission's Report and Order will become effective on September 7, and Suburban has not yet requested rehearing of that order. However, on August 30, Suburban, filed a "Motion for Nonunanimous Stipulation and Agreement and Motion for Expedited Treatment," which included an exhibit entitled "Stipulation and Agreement."¹ Suburban's motion and the attached Stipulation and Agreement were signed and filed solely by the attorneys for Suburban. The other two parties in this case (Staff and the Office of the Public Counsel), neither signed nor jointly filed these documents.

In its motion, Suburban indicates: "This motion and all attachments constitute a settlement offer." Suburban's motion also states: "Respondent hereby proposes the stipulation and agreement attached as Exhibit A hereto, and incorporated by reference herein, which has not been approved by the OPC, the Staff, or the Commission, but which it believes will effect a fair and full settlement and resolution of the Cases." In its prayer for relief, Suburban asked the Commission to "approve the attached stipulation and agreement and for such other and further relief as the Commission deems just and proper in the circumstances."

On August 31, Public Counsel filed its Objection and Motion to Strike, in which it requested that the Commission strike Suburban's August 30 filings in their entirety since they are "inappropriate communications with the Commission containing confidential settlement negotiation information between the parties" and represent "an inappropriate unilateral attempt to communicate *ex parte* with the Commission as well as to bypass the other

¹ Suburban filed the same motion in Case No. WC-2008-0030, a separate complaint case brought by Staff. The Commission will address Suburban's motion in that case in a separate order.

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parties in these cases and open settlement negotiations directly with the Commission.” A few days later, on September 4, Staff filed a pleading titled “Staff’s Objection and Motion to Strike Suburban’s Improper Unilateral Settlement Offer,” in which it raised similar concerns and also requested that the Commission strike Suburban’s “improper motion and Stipulation and Agreement as an offer of settlement to the Commission,” which is not a party but a neutral adjudicator.

While the Commission certainly encourages compromise and settlement of contested claims in general, the Commission finds that both objections are well taken. As correctly noted by Public Counsel and Staff, at present there is no completed, multilaterally-negotiated “stipulation” or “agreement” for the Commission to approve – instead, there is only an offer from Suburban. Furthermore, while portions of Exhibit A have evidently been used by the parties in an attempt to settle Case No. WC-2008-0030, it clearly does not constitute a completed negotiated settlement involving two or more parties; the confidential settlement negotiation information it contains was not intended to be revealed to the Commission or to the public; neither Public Counsel nor Staff agreed to the disclosure of any such information to either the Commission or the public; and Suburban’s pleadings contain certain factual assertions that are vigorously contested by Public Counsel and Staff. Instead, Suburban filed the documents with the Commission as if they had been mutually agreed on without first obtaining permission from or even notifying Public Counsel or Staff.

For all these reasons, the Commission will grant Public Counsel’s August 31 Motion to Strike, as well as Staff’s September 4 Motion to Strike Suburban’s Improper Unilateral Settlement Offer. If it is the Respondent’s intention to negotiate with the Commission, such negotiations and discussions can take place at the conclusion of the case or before the Circuit Court.

IT IS ORDERED THAT:

1. The Motion to Strike filed by the Office of the Public Counsel on August 31, 2007 is granted, as is Staff’s Motion to Strike Suburban’s Improper Unilateral Settlement Offer, which was filed on September 4, 2007.
2. This order shall become effective on September 16, 2007.

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Davis, Chm., Murray, Gaw, Clayton
and Appling, CC., concur.

Woodruff, Deputy Chief Regulatory Law Judge

NOTE: See page 334 for another order in this case.

**In the Matter of Missouri-American Water Company's Request for
Authority to Implement a General Rate Increase for Water Service
Provided in Missouri Service Areas**

Case No. WR-2007-0216, et al.

Decided: September 6, 2007

Water §1. The Commission approves an unopposed non-unanimous stipulation and agreement between Missouri-American Water Company, City of Jefferson City, Missouri, the Staff of the Missouri Public Service Commission and the Office of the Public Counsel regarding infrastructure and service improvements.

Water §6. The Commission has the legal authority to accept stipulations and agreements as offered by the parties pursuant to Section 536.060, RSMo 2000. See also Commission Rule 4 CSR 240-2.115.

Water §15. Agreement regarding infrastructure improvements, specifically back-up power generation, water storage, and small main replacement, resolved by party agreement without Commission endorsement of any parties' position.

Water §19. Commission-approved agreement regarding infrastructure improvements, specifically back-up power generation, water storage, and small main replacement, designed to improve service to keep up with customer demand.

Water §29. Commission-approved agreement regarding infrastructure improvements, specifically back-up power generation, water storage, and small main replacement, designed to improve reliability of distribution, i.e. pressure and volume of water, for city fire suppression.

**ORDER APPROVING NON-UNANIMOUS STIPULATION AND
AGREEMENT AS TO JEFFERSON CITY ISSUES**

On December 15, 2006, Missouri-American Water Company (MAWC) filed proposed tariff sheets seeking a general rate increase for water and sewer service provided to customers in its Missouri service

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areas. On January 3, 2007,¹ the Commission issued an order suspending the proposed water and sewer tariff sheets for 120 days plus six months from the original proposed effective date, that is, until November 14.

The evidentiary hearing in this matter concluded on August 14. On August 23, prior to the Commission issuing its final decision concerning MAWC's proposed rate increase, MAWC, the City of Jefferson ("Jefferson City"), the Staff of the Missouri Public Service Commission ("Staff"), and the Office of the Public Counsel ("OPC") jointly filed a pleading entitled: "Stipulation and Agreement as to Jefferson City Issues" ("Agreement"). The Agreement purports to resolve issues separate from the determination of MAWC's rates that exist between Jefferson City and MAWC. These issues concern fire suppression and certain infrastructure improvements; specifically, back-up power generation, water storage and small main replacement.

The Agreement is non-unanimous in that the remaining parties to this action are not signatories to the Agreement, and as such, it is governed by Commission Rule 4 CSR 240-2.115(2). That rule provides that non-signatory parties have seven days from the filing of a non-unanimous stipulation and agreement to file objections.² Failure to timely file such an objection constitutes a full waiver of that party's right to a hearing on the agreement.³ If no party timely objects to a non-unanimous stipulation and agreement, the Commission may treat the agreement as being a unanimous stipulation and agreement.⁴

Because no party objected, the Agreement became unanimous by operation of Commission Rule on August 31.⁵ The Agreement provides for installation of a back-up generator, the specifications of which are attached to the Agreement as Appendix A. Configuration specifications and performance and load testing are also delineated in the Agreement, as well as a target date for the generator's installation, which is December 21.

The Agreement also provides for the mutual exchange of any

¹ All dates following the date of the suspension order reference the year 2007 unless otherwise noted.

² Commission Rule 4 CSR 240-2.115(2)(B).

³ Commission Rule 4 CSR 240-2.115(2)(B).

⁴ Commission Rule 4 CSR 240-2.115(2)(C).

⁵ Commission Rule 4 CSR 240-2.115(2)(C).

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study results undertaken by the parties within the past three years regarding forecasted consumer loads in Jefferson City, the condition or improvement to MAWC's storage or treatment capacity, or the condition of major transmission mains. The Agreement requires the creation of a task force with representatives from each party to the Agreement to review all studies described above and engage in further studies related to MAWC's existing storage, treatment, transmission and pumping facilities. The task force, or each party, is required to prepare a final report summarizing activities of the task force and any identified improvement options.

The Agreement states: "As a result of this Stipulation, no changes shall need to be made to the Nonunanimous Stipulation and Agreement filed previously in this case on August 9, 2007." The Agreement has no affect on the Commission's determination concerning MAWC's rate increase request or the signatories' positions concerning the determinaiton on MAWC's rate. Should the Commission accept the specific terms of the Agreement, the signatories represent that each shall waive their respective rights to present oral argument and written briefs pursuant to Section 536.080.1, RSMo 2000;⁶ their respective rights to the reading of the transcript by the Commission pursuant to Section 536.080.2; their respective rights to seek rehearing pursuant to Section 536.500; and their respective rights to judicial review pursuant to Section 386.510..

After reviewing the Agreement, the Commission finds that the stipulation and agreement filed on August 23 should be approved as a resolution of the issues addressed by that stipulation and agreement. In approving this stipulation and agreement, the Commission is only accepting the agreement of the parties to resolve these particular issues in this particular case. The Commission is not endorsing any particular position with regard to these issues and its approval of this stipulation and agreement should not be interpreted as an endorsement in any future case.

IT IS ORDERED THAT:

⁶ All statutory references are to RSMO 2000 unless otherwise noted.

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1. The Stipulation and Agreement as to Jefferson City Issues filed on August 23, 2007, is approved as a resolution of the issues addressed in that stipulation and agreement. A copy of the stipulation and agreement is attached to this order as Exhibit A.
2. The signatory parties are ordered to comply with the terms of the Stipulation and Agreement as to Jefferson City Issues.
3. This order shall become effective on September 16, 2007.

Davis, Chm., Murray, Gaw, Clayton
and Appling, CC., concur.

Stearley, Regulatory Law Judge

NOTE: See pages 367 and 386 for other orders in this case.

**In the Matter of the Verified Application of Laclede Gas Company for
an Order Establishing Replacement Requirements for the Final Phase
of its Soft Copper Service Line Replacement Program Previously
Approved Pursuant to Case No. GO-99-155**

*Case No. GS-2008-0038
Decided: September 20, 2007*

Gas §35. The Commission allowed Laclede to reduce the number of replacements to the buried soft copper service lines. Meanwhile the Commission ordered Staff to report annually and if the public safety is compromised, to present that information immediately.

**ORDER GRANTING REDUCTION OF
REPLACEMENT REQUIREMENTS**

The Commission opened Case No. GO-99-155 on October 30, 1998, as a general investigatory case to receive information relevant to the adequacy of Laclede Gas Company's direct-buried copper service line replacement program and the effectiveness of Laclede's leak survey procedures.¹ On February 18, 2000, Laclede, Staff and the Office of the

¹ Staff's investigation into the Pralle Lane (Case No. GS-98-422) and Bergerac Drive (Case No. GS-98-423) natural gas incidents led to Staff filing, on October 14, 1998, a motion to open this case.

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Public Counsel filed a Unanimous Stipulation and Agreement. As part of the Agreement, Laclede agreed to submit annual reports to Staff detailing direct-buried copper service line renewals and relays² completed, and agreed to submit additional reports confirming the achievement of other milestones under the Agreement. The Agreement provided that after the third year of the program, Laclede and Staff would review the progress and results of the program to determine future relay/renewal plans, including the rate of such future actions, and potential modifications to survey techniques and other related matters. On May 18, 2000, the Commission issued an order approving the Unanimous Stipulation and Agreement.

On August 1, 2003, Staff filed its Three-Year Summary Report. Staff requested that the Commission continue the current requirements of the Unanimous Stipulation and Agreement, with annual reporting from Staff. Staff stated that the requirements of the Copper Service Line Replacement Program reflect the overall goals of protecting the public, achieving a substantial number of replacements annually, using effective leak detection methods, and making timely repairs, while also being mindful of ratepayers' costs. Staff suggested that Laclede has met or exceeded the guidelines of the Stipulation and that the crucial goal of public safety is being maintained.

The Commission conducted a limited hearing on December 5, 2003.³ On March 5, 2004, the Commission issued its Report and Order, adopting Staff's recommendation that the Commission continue the current requirements of the previously approved Stipulation and Agreement with annual reporting from Staff.

In Staff's most recent Annual Report filed on August 30, 2006, Staff stated that it completed an analysis of Laclede's copper service line replacements and bar-hole survey data. Based on its review, Staff recommended that the Commission continue the current requirements of the Stipulation and Agreement, with continued annual reporting from Staff.

On August 8, 2007, Laclede filed a Verified Application Requesting a Revision in the Replacement Requirements for Case No. GO-99-155 Establishing the Adequacy of the Company's Copper Service Line Replacement Program and Leak Survey Procedures for Soft Copper Service Lines, Case No. GS-2008-0038.

In its Application, Laclede requested a reduction in the number of soft copper service lines it is required to replace annually from 8,000 to

² As used in this order, the term "renewal" refers to a main to meter replacement of a service line and the term "relay" refers to the replacement of a specific segment of a service line.

³ The Commission indicated that the purpose of the hearing was to determine whether Staff's recommendations should be approved without the necessity for further hearings.

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5,600 due to increased costs of replacing the remaining copper lines. In addition to the costs, Laclede noted the remaining lines are scattered throughout high traffic areas or in locations where construction is difficult. Laclede also noted in its Application that this approach had been approved in the later stages of previous replacement programs.

Staff filed its recommendation on September 6, 2007. Staff indicates Laclede's request is consistent with the goal of the program of assuring public safety and recommends establishing an acceleration replacement deadline of February 2009 for all buried soft copper service lines in Pressure Region I. Pressure Region I is the area in which the previous incidents occurred and has the greatest present potential for additional leaks. Staff suggests Laclede be required to replace 7,000 soft copper service lines annually, continue annual bar-hole surveys and comply with the guidelines in the original Stipulation and Agreement. Staff notes the overall average replacement rate for the duration of the program will still be approximately 8,000 service line replacements per year if Laclede follows Staff's recommendations. Staff also recommends the Commission allow Laclede the right to seek additional modifications next year upon completion of the next leak survey.

On September 13, 2007, Laclede filed its response to the Staff Recommendation. Laclede stated it is willing to accept the modified program terms as set forth in Staff's Recommendation and reserves the right to renew its request for additional modification in the terms of the program next year upon completion of its next leak survey of direct-buried copper service lines.

IT IS THEREFORE ORDERED:

1. Laclede shall continue to meet all requirements of the original Stipulation and Agreement.
2. Laclede may reduce the number of replacements to the buried soft copper service lines from 8,000 to 7,000 lines annually, commencing in the current program year ending February 2008.
3. The accelerated replacement deadline for all buried soft copper service lines in Pressure Region I is February 2009.
4. Staff of the Commission shall continue to report to the Commission annually and, if at any time the leakage rate increases or Staff determines that public safety is compromised, Staff shall immediately present this information to the Commission and recommend appropriate remedial action.
5. This order shall become effective September 30, 2007.

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6. This case may be closed on October 1, 2007.

Davis, Chm., Murray, Appling, and Jarett, CC., concur.
Clayton, C., dissent, with dissenting opinion
to follow.

Dale, Chief Regulatory Law Judge

NOTE: At the time of publication, no dissenting opinions have been issued.

**In the Matter of Missouri-American Water Company's Request for
Authority to Implement a General Rate Increase for Water Service
Provided in Missouri Service Areas**

Case No. WR-2007-0216, et al.

Decided: September 20, 2007

Water §1. The Commission approves an unopposed non-unanimous stipulation and agreement between Missouri-American Water Company and Metropolitan St. Louis Sewer District regarding rate design.

Water §6. The Commission has the legal authority to accept stipulations and agreements as offered by the parties pursuant to Section 536.060, RSMo 2000. See also Commission Rule 4 CSR 240-2.115.

Water §16. Under the terms of the stipulation and agreement, MAWC will provide water usage and meter reading data and customer billing information and related services to MSD for which MSD will pay MAWC \$29,166 per month (\$350,000 annually). The rate of compensation will be incorporated into a revised tariff sheet, number RT 16, and loss of revenue associated with this change from the existing rate paid by MSD will be reflected in the revenue requirement to be ordered by the Commission in this case. The Commission approved the agreement without endorsement of any parties' position.

**ORDER APPROVING NON-UNANIMOUS STIPULATION AND
AGREEMENT AS TO MSD RATE DESIGN BETWEEN MAWC AND
MSD**

On December 15, 2006, Missouri-American Water Company (MAWC) filed proposed tariff sheets seeking a general rate increase for water and sewer service provided to customers in its Missouri service areas. On January 3, 2007,¹ the Commission issued an order suspending the proposed water and sewer tariff sheets for 120 days plus six months

¹ All dates following the date of the suspension order reference the year 2007 unless otherwise noted.

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from the original proposed effective date, that is, until November 14.

On July 16, prior to commencing the hearing in this matter, MAWC and the Metropolitan St. Louis Sewer District (MSD) filed a Non-Unanimous Stipulation and Agreement ("Agreement") to settle the MSD rate design issue. As summarized, the Agreement provides for the following:

1. MAWC will provide water usage and meter reading data and customer billing information and related services to MSD for which MSD will pay MAWC \$29,166 per month (\$350,000 annually). The rate of compensation will be incorporated into a revised tariff sheet, number RT 16 (a draft copy is attached to the Agreement as Appendix A), proposed to be effective for service on and after December 1, 2007. The loss of revenue associated with this change from the existing rate paid by MSD will be reflected in the revenue requirement to be ordered by the Commission in this case.
2. MAWC and MSD agree to execute an agreement containing the specific terms and conditions of providing the information identified above by October 1, 2007.
3. MAWC and MSD agree that if this Agreement is approved, that neither party to the Agreement will take any action to alter or rescind the rate identified in Appendix A to the Agreement prior to MAWC's next general rate case, at which both parties are free to ask the Commission to review and revise the rates, terms and condition regarding the provision of the billing data and related services.
4. MAWC also agrees to provide to MSD, prior to its next general rate increase request, the incremental costs it incurs in providing data and related services to MSD pursuant to the aforementioned agreement in item 2 above.
5. The parties further agree that, unless called upon by the Commission to respond to questions, that in the event the Commission approves the Agreement, the portions of the direct testimony of witnesses Janice M. Zimmerman and Keith D. Barber, concerning matters not at issue between the parties shall be received into evidence without the necessity of these witnesses taking the stand.

The Agreement is non-unanimous in that the remaining parties to this action are not signatories to the Agreement, and as such, it is governed by Commission Rule 4 CSR 240-2.115(2). That rule provides that non-signatory parties have seven days from the filing of a non-unanimous

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stipulation and agreement to file objections.² Failure to timely file such an objection constitutes a full waiver of that party's right to a hearing on the agreement.³ If no party timely objects to a non-unanimous stipulation and agreement, the Commission may treat the agreement as being a unanimous stipulation and agreement.⁴ Because no party objected, the Agreement became unanimous by operation of Commission Rule on July 24.⁵

The Agreement has no affect on the Commission's determination concerning MAWC's rate increase request or the signatories' positions concerning the determination on MAWC's rate. Should the Commission accept the specific terms of the Agreement, the signatories represent that each shall waive their respective rights to present oral argument and written briefs pursuant to Section 536.080.1, RSMo 2000;⁶ their respective rights to the reading of the transcript by the Commission pursuant to Section 536.080.2; their respective rights to seek rehearing pursuant to Section 536.500; and their respective rights to judicial review pursuant to Section 386.510.

After reviewing the Agreement, the Commission finds that the stipulation and agreement filed on July 17 should be approved as a resolution of the issues addressed by that stipulation and agreement. In approving this stipulation and agreement, the Commission is only accepting the agreement of the parties to resolve these particular issues in this particular case. The Commission is not endorsing any particular position with regarding to these issues and its approval of this stipulation and agreement should not be interpreted as such an endorsement in any future case.

IT IS ORDERED THAT:

1. The "Stipulation and Agreement as to MSD Rate Design Between MAWC and MSD" filed on July 17, 2007, is approved as a resolution of the issues addressed in that stipulation and agreement. A copy of the stipulation and agreement is attached to this order as Exhibit A.

2. The signatory parties are ordered to comply with the terms of the "Stipulation and Agreement as to MSD Rate Design Between MAWC and MSD."

² Commission Rule 4 CSR 240-2.115(2)(B).

³ Commission Rule 4 CSR 240-2.115(2)(B).

⁴ Commission Rule 4 CSR 240-2.115(2)(C).

⁵ Commission Rule 4 CSR 240-2.115(2)(C).

⁶ All statutory references are to RSMO 2000 unless otherwise noted.

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3. This order shall become effective on September 30, 2007.

Davis, Chm., Murray, Clayton, Appling,
and Jarrett, CC., concur.

Stearley, Regulatory Law Judge

NOTE: See page 386 for another order in this case.

**In the Matter of Missouri Gas Energy's Purchased Gas Adjustment
(PGA) Factors to be Audited in Its 2002-2003 Actual Cost Adjustment**

**In the Matter of Missouri Gas Energy's Purchased Gas Adjustment
Tariff Revisions to be Reviewed in Its 2001-2002 Actual Cost
Adjustment**

Case Nos. GR-2003-0330 and GR-2002-348

Decided: October 2, 2007

Gas §17. The Commission rejected Staff's proposed disallowance for MGE failing to properly analyze its pipeline needs because Staff failed to overcome the presumption of prudence by demonstrating a serious doubt about the prudence of MGE's decisions.

REPORT AND ORDER

APPEARANCES

Gary W. Duffy, and Janet Wheeler, Attorneys at Law, Brydon Swearengen & England, 312 East Capitol Avenue, Jefferson City, Missouri 65102, for Missouri Gas Energy.

Mark D. Poston, Senior Public Counsel, Office of the Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the Public.

Steven C. Reed, Chief Litigation Attorney, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Morris L. Woodruff

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SUMMARY

The Commission finds that the Commission's Staff has failed to create a serious doubt about the prudence of MGE's decisions regarding the determination of appropriate natural gas pipeline capacity. Therefore, Staff's proposed disallowance regarding excess pipeline capacity is denied.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The Commission in making this decision has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Procedural History

In this consolidated proceeding, the Commission is considering Missouri Gas Energy's Actual Cost Adjustment for two years. Case Number GR-2002-348 was established on October 16, 2002, to track the over-recovery or under-recovery of MGE's natural gas costs for the Actual Cost Adjustment (ACA) period for 2001-2002. Case Number GR-2003-0330 was established on March 17, 2003, to review MGE's ACA for 2002-2003. The Commission consolidated the two cases for all purposes on April 12, 2005.

There were originally two contested issues in this consolidated case relating to adjustments that Staff asked the Commission to make to MGE's ACA balances. The first issue concerned an adjustment based on the alleged imprudence of MGE's contract with Mid-Kansas Pipeline Company and Riverside Pipeline Company for the interstate transportation of natural gas. The second issue concerned an adjustment based on Staff's contention that MGE imprudently purchased more pipeline capacity than it needs to serve its customers.

The first issue, regarding the alleged imprudence of the pipeline contract, was previously litigated in Commission Case Number GR-96-450, the case concerning MGE's 1996-1997 ACA. In its Report and Order in GR-96-450, the Commission found that Staff had failed to present competent and substantial evidence sufficient to raise a serious doubt about the prudence of the pipeline contract. For that reason, the Commission rejected Staff's proposed disallowance for the 1996-1997 ACA. The Commission, however, found that it could not determine whether a

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stipulation and agreement from a still earlier case would preclude prudence reviews regarding that contract in future ACAs. Kansas Pipeline appealed that aspect of the Report and Order.

While that first issue was subject to appeal, the Commission could not address that issue in this case. Rather than wait for the results of that appeal, the Commission decided to set aside the question of the prudence of the pipeline contract and proceed to hear the other issue. Subsequently, the Commission held hearings concerning the second issue on August 28 and 29, 2006. Staff and MGE filed pre-hearing briefs on August 22, 2006. Staff, MGE and Public Counsel filed post-hearing briefs on October 23, 2006. Staff and MGE also filed proposed findings of fact and conclusions of law on October 23, 2006.

The appeal of the issue of the prudence of MGE's interstate pipeline contract with Mid-Kansas Pipeline Company and Riverside Pipeline Company followed a convoluted path through the appellate courts until it was finally resolved by a decision of the Missouri Supreme Court, issued on January 30, 2007.¹ The Supreme Court held that the Commission was precluded from considering the prudence of that contract by a stipulation and agreement approved by the Commission in an earlier case. In response to the Supreme Court's decision, Staff formally withdrew the Kansas Pipeline issue from this case in a notice of withdrawal of issue filed on May 18, 2007. The Commission is now free to decide the remaining issue.

Proposed Disallowance for Excess Pipeline Capacity

Staff alleges MGE failed to properly plan for the amount of interstate pipeline capacity it needed to reserve to meet the needs of its customers. Because of that allegedly poor planning, Staff contends MGE imprudently failed to reduce its capacity on the Southern Star interstate pipeline when it renegotiated its contract with that pipeline in 2001. Staff claims MGE reserved a substantial amount² of decatherms per day in excess capacity on the Southern Star pipeline for the Kansas City and St. Joseph areas in both the 2001-2002 and 2002-2003 ACA periods. Staff calculated the cost of reserving that excess capacity in 2001-2002 as \$2,041,931.³ For 2002-2003, Staff calculated that cost as \$2,015,661.⁴

¹ State ex rel. Riverside Pipeline Co. v. Pub. Serv. Comm'n, 215 S.W.3d 76 (Mo. 2007).

² The exact amount of capacity that Staff claims to be excessive is highly confidential.

³ Jenkins Direct, Ex. 7, Page 37, Line 17.

⁴ Jenkins Direct, Ex. 7, Page 38, Line 1.

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Based on these calculations, Staff proposed a disallowance for the two ACA periods totaling \$4,057,592.

Background on Transportation of Natural Gas

When moving natural gas to its customers, a local distribution company (LDC), such as MGE, must use the services of an interstate pipeline to transport that gas from the production areas to the LDC's service area. At the time in question, MGE contracted with four interstate pipelines to transport the gas it needs to serve its customers: Southern Star Central f/k/a Williams Gas Pipeline – Central; Panhandle Eastern Pipe Line Company; Enbridge Pipelines; and Pony Express Pipeline.⁵

The amount of gas that can move through a pipeline is finite; only a certain number of gas molecules can be squeezed into the pipeline. When demand for gas is high, not enough gas can be moved through the pipeline to satisfy the entire demand. Under those circumstances, the supply of gas to some users may have to be shut-off.

To avoid being shut-off, an LDC, or other shipper on the pipeline, can purchase reserved capacity on the pipeline. By purchasing reserved capacity, a shipper ensures that it will be able to move enough gas through the pipeline to meet its needs, even when demand for natural gas is high. Of course, reserving capacity on a pipeline costs money. Therefore, a shipper wants to purchase enough capacity to meet its needs, while not wasting money by purchasing too much capacity.

Design Day Demand

Firm capacity on the Southern Star pipeline, as on most interstate pipelines, is sold on a year-round basis. For that reason, MGE must plan to reserve enough pipeline capacity to transport the natural gas its customers will need on the one day during the year that the demand for gas will be at its highest. Since the greatest demand for gas in Missouri is for space heating in the winter, the day on which the demand for gas is likely to peak is the coldest day of the winter. Therefore, in order to determine how much capacity should reasonably be reserved, MGE must determine how cold a winter day can reasonably be anticipated and, more importantly, how much gas is likely to be used on that very cold day. MGE may be able to sell some of its unused pipeline capacity on days that demand does not peak, but having that capacity reserved and available is like an insurance policy protecting its customers' ability to obtain the gas they need when that very cold day arrives.

⁵ Kirkland Direct, Ex. 4, Page 10, Lines 16-21.

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The day when usage is expected to peak is known as the design day because the system must be designed to be capable of meeting the demand for gas on that day. To calculate the amount of gas it would need to supply on a design day, MGE undertook the following steps:

- Peak day demand from the prior year was identified and baseload was subtracted to calculate the heat load on this specific day.
- The HDD [heating degree days] for that day was identified and adjusted by MGE for wind.
- The heat load was then divided by the wind-adjusted HDD to calculate a heat load factor.
- The heat load factor was then applied to the MGE design temperature, which was a wind-adjusted 85 HDD.
- The baseload was then added to the heat load to produce the design day demand.⁶

In the context of these calculations, a peak day demand is the amount of natural gas actually used on the day in which the maximum amount of gas was delivered to customers in the previous year. Usually, that will be coldest day of the year.⁷ Peak day demand is not the same as design day demand because the coldest day of a particular winter may not approach the coldest day that could occur. Baseload is the amount of gas that is likely to be used regardless of the outside temperature. It would include gas used in industrial processes as well as for home cooking and water heating to the extent that such usage is not affected by the weather. Heatload, in contrast to baseload, is the amount of gas usage that is dependent on the weather. Heating degree days are a measure of the amount by which the average temperature for the day is below 65 degrees, the level at which customers are likely to need to use gas to heat their homes. For example, a day in which the average temperature was 10 degrees would have 55 HDD.⁸

Staff's Challenge to MGE's Design Day Forecast Determination of Coldest Day

⁶ Kirkland Surrebuttal, Ex. 6, Pages 13-14, Lines 21-23, 1-6.

⁷ Reed Direct, Ex.1, Page 7, Lines 1-3.

⁸ Jenkins Direct, Ex. 7, Page 12, Lines 8-11.

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Staff challenged the accuracy of several of inputs to MGE's calculations. First, in calculating the HDD for its forecasted design day, MGE looked at the coldest day reported at the Kansas City airport by Accu-Weather, Inc. That coldest day occurred on December 21, 1989, when the high temperature was 12 degrees below zero, the low was 23 degrees below, and the average wind speed was 14 miles per hour. That resulted in 83 HDD, which MGE adjusted to 85 HDD to account for the wind chill resulting from the high wind speeds.⁹

For its calculations, Staff used historical data from the National Oceanic and Atmospheric Administration's National Climatic Data Center to find a peak of 80.5 HDD occurring on December 22, 1989.¹⁰ Staff did not adjust that figure to account for wind chill.

For purposes of the hearing, MGE engaged the services of an independent consulting firm, Concentric Energy Advisors, Inc., to perform its own evaluation of the design day forecasts of Staff and MGE. John Reed, Chairman and Chief Executive Officer of Concentric Energy Advisors,¹¹ testified that rather than use the coldest historical day, he calculated the coldest reasonably likely day by averaging the observed coldest day for the last 30 years, determining the standard deviation around that mean, and calculating a statistical value of 81.9 HDD as the coldest day likely to occur once in 100 years in Kansas City.¹²

Clearly, there are different ways to calculate the coldest day likely to be experienced in MGE's gas service area. The HDD figure used by MGE in calculating its design day gas needs is a few degrees higher than the figure used by either Staff or MGE's consultant, particularly because it is adjusted upward to account for wind chill. However, David Kirkland, MGE's Director of Gas Supply,¹³ offered his expert opinion that industry standards permit the use of wind-adjusted temperatures in calculating design day gas needs.¹⁴ Staff offered no evidence to rebut that opinion.

Application of Kansas City's Coldest Day to the Entire System

Staff also challenged MGE's decision to calculate the design day gas needs for its entire system based on the coldest temperature observed at the Kansas City airport. Approximately 15 percent of the gas drawn

⁹ Kirkland Surrebuttal, Ex. 6, Page 14, Lines 27-32.

¹⁰ Jenkins Direct, Ex. 7, Page 13, Lines 6-9.

¹¹ Reed Direct, Ex. 1, Page 1, Lines 12-15.

¹² Reed Direct, Ex. 1, Pages 27-28, Lines 20-23, 1-22..

¹³ Kirkland Direct, Ex. 4, Page 3, Lines 10-11.

¹⁴ Transcript, Page 152, Lines 14-21.

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through MGE's system at peak demand is delivered to the Joplin area.¹⁵ Since Joplin is approximately 160 miles south of Kansas City, it does not get quite as cold in the winter. For that reason, Staff uses the coldest temperature recorded at Springfield, Missouri, approximately 70 miles east of Joplin, to determine a HDD of 72.1 for Joplin.¹⁶ MGE's consultant, John Reed, also used Springfield data to represent MGE's Joplin service area in making his calculations because no NOAA weather data is available for Joplin.¹⁷ Using a 1-in-100 year likelihood of occurrence calculation, Reed determined a design day HDD of 76.3 for the Joplin service area.¹⁸

Reed explained that his analysis used a separate design day temperature for the Joplin service area because he believes that to be the best practice. Based on Reed's advice as a consultant, MGE has followed that practice in its reliability calculations for the years subsequent to the years in question. However, Reed states that MGE's use of the weather at a single observation point to determine design day temperature for the entire system is "well within industry norms" for the analysis it performed.¹⁹ Again, Staff offered no evidence to rebut that opinion.

Calculation of Heatload Factor

Staff also challenged the accuracy of MGE's calculations of the heatload factor, in other words, the amount of gas usage that is dependent upon temperature. MGE calculated the heatload factor by determining the amount of gas actually used on its system on the single coldest day of the previous years, and then subtracting the baseload, the portion of gas used that is not dependent upon variations in temperature.

Staff roundly criticized MGE's approach for using only one data point each year to determine the heat load factor.²⁰ In contrast to MGE, Staff performed a regression analysis utilizing total daily usage data, both baseload and heatload, for every winter day for four winters between November 1, 1997, and March 31, 2001, to estimate MGE's heatload.²¹ This method allowed Staff to rely on many more data points in making its calculations.

John Reed, the consultant hired by MGE, agreed with Staff that the use of multiple data points to measure gas usage on cold days was

¹⁵ Transcript, Page 72, Lines 21-24.

¹⁶ Jenkins Direct, Ex. 7, Page 17, Lines 16-18.

¹⁷ Reed Direct, Ex. 1, Page 28, Lines 11-12.

¹⁸ Reed Direct, Ex. 1, Page 28, Lines 18-19.

¹⁹ Transcript, Page 114, Lines 10-25.

²⁰ Jenkins Direct, Ex. 7, Page 20, Lines 8-11.

²¹ Jenkins Direct, Ex. 7, Page 21, Lines 11-13.

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preferable to using only a single data point.²² However, the data used must also be appropriate, not just voluminous. The design day demand analysis prepared by Reed's consulting firm used the three highest demand days that were also within the ten coldest days for the four winters for which data was available.²³

The use of multiple data points does not by itself create reliable results. Staff uses many data points, but its approach suffers from a fundamental flaw in that its regression analysis was premised on input data that was not representative of the data that was to be forecasted with the regression analysis.²⁴ By using data showing the amount of gas used on every winter day, including days that were quite warm, Staff predicted the amount of gas likely to be used on an average winter day. But the regression analysis should be predicting the amount of gas likely to be used during the extremely cold weather of a design day. Thus, Staff's calculations tend to understate the amount of gas likely to be needed on a design day.

Calculation of Baseload Factor

The other factor needed to calculate a design day demand is the baseload, in other words, the amount of gas used on the system that is not related to the weather. MGE, the consulting firm, and most other LDC's around the country, simply use the amount of gas dispatched during the summer months, when demand for space heating is zero, to establish the baseload.²⁵ Staff contends that baseload could be different in the winter than it is in the summer²⁶ and for that reason used the previously described regression analysis to determine winter baseload as well as heatload.²⁷

Unfortunately, Staff's calculations do not reflect reality. Staff's estimate of baseload demand for Kansas City derived from its calculations are only about half of the actual demand on the system during the summer months when heatload is not a factor.²⁸ At the hearing, Staff speculated perhaps the summer baseload was affected by the use of natural gas by electric generating plants.²⁹ Staff, however, offered no evidence to support

²² Transcript, Page 46, Lines 19-24.

²³ Reed Direct, Ex. 1, Page 36, Lines 7-9.

²⁴ Reed Direct, Ex. 1, Page 37, Lines 15-17.

²⁵ Reed Direct, Ex. 1, Page 33, Lines 4-13.

²⁶ Jenkins Direct, Ex. 7, Pages 19-20, Lines 21-23, 1.

²⁷ Transcript, Page 255, Lines 18-24.

²⁸ Reed Direct, Ex. 1, Page 34, Lines 10-16.

²⁹ Transcript, Page 256, Lines 16-23.

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that speculation. Indeed, MGE has no interruptible load, which would be indicative of gas use by an electric power plant, on its system.³⁰

Furthermore, the consultant hired by MGE tested Staff's regression equation by applying it to predict the amount of gas used on twelve actual high-demand cold-weather days in the past. That test revealed that Staff's equation under predicted the amount of gas actually used on those high-demand cold-weather days. For five of those twelve cold days, the under-prediction would exceed the reserve margin allowed by Staff's formula.³¹

In summary, Staff's calculations of the amount of gas MGE would need to meet design day requirements is flawed and understates the amount of gas likely to be needed. The separate forecast prepared by MGE's consultant, using best practices and avoiding the weaknesses that Staff identified in MGE's forecast, predicts gas usage that is very close to the usage predicted by MGE.³² Therefore, there is no basis for the Commission to conclude that MGE has overestimated the amount of gas it needs to meet design day demand or that MGE has contracted for surplus pipeline capacity.

The Determination of Appropriate Pipeline Capacity Requires More Than Just a Formula

Even if the Commission were to accept Staff's calculations and find that MGE had more pipeline capacity than indicated by those calculations, that finding would not establish that MGE had acted imprudently, and would not justify the disallowance proposed by Staff. The planning process for determining how much pipeline capacity should be purchased is more complicated than simply plugging some numbers into a formula and then buying the amount of capacity needed to match the results of the formula.

MGE, like other LDCs, must make decisions about how much pipeline capacity to reserve years in advance. Those decisions must take into account a number of factors, including "competitive market factors, economics, reliability, supply basin diversity, pipeline diversity, regulatory considerations and pipeline tariff requirements."³³ Natural gas pipeline companies periodically add capacity in large blocks that may not match the immediate needs of the LDC.³⁴ Therefore, an LDC must purchase capacity to meet its future needs when that capacity is available.

³⁰ Transcript, Page 131, Lines 21-25.

³¹ Reed Rebuttal, Ex. 2, Page 27, Lines 6-19.

³² Reed Direct, Page 45, Lines 4-15.

³³ Kirkland Direct, Ex. 4, Page 8, Lines 9-11.

³⁴ Kirkland Direct, Ex. 4, Page 8, Lines 11-14.

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Staff contends its formula showed that MGE had more capacity than it immediately needed and proposed a disallowance based on that formula. Staff did not conduct any deeper evaluation of MGE's planning process. Indeed, Staff did not allege that any particular action by MGE was imprudent, other than to argue that MGE could have reduced its capacity by the amount specified by Staff when it renegotiated its contract with Southern Star Central pipeline effective June 2001.³⁵

MGE explained that capacity on Southern Star Central is low cost capacity that has access to different supply basins. It is the only pipeline that serves all three of MGE's service regions, affording MGE certain administrative and operational benefits across those regions.³⁶ Furthermore, if MGE had relinquished pipeline capacity on Southern Star Central to comply with Staff's formula, it also would have been required to relinquish a portion of its valuable gas storage capacity on that pipeline.³⁷

In addition, at all relevant times, Southern Star Pipeline was fully subscribed. That means any capacity MGE relinquished to comply with Staff's formula would likely be sold to another shipper and would no longer be available to MGE to meet future needs.³⁸ As demand for gas increases, MGE will likely need additional capacity.³⁹

Even assuming that MGE could repurchase the relinquished capacity in the future, the cost of repurchasing that capacity would likely increase because Federal Energy Regulatory Commission (FERC) policy requires that any future pipeline capacity expansion be priced at a higher incremental rate charged to new customers.⁴⁰ Staff admittedly did not consider this fact in its analysis.⁴¹ As David Kirkland explained for MGE, "Staff is suggesting that MGE reduce the most flexible capacity asset it has, which is also low-cost, to achieve a short term capacity reduction but at a potentially much higher long-term cost."⁴²

The long-term cost of underestimating pipeline capacity needs could be very high indeed. Aside from the possible need to repurchase capacity at higher rate, the cost of failing to reserve enough pipeline capacity to supply the natural gas needed to meet customer needs on a truly cold day could be catastrophic, both in terms of dollars, as well as in

³⁵ Jenkins Direct, Ex. 7, Pages 29-30, Lines 21-23, 1-10.

³⁶ Kirkland Rebuttal, Ex. 5, Page 40, Lines 10-14.

³⁷ Kirkland Rebuttal, Ex. 5, Page 41, Lines 1-4.

³⁸ Kirkland Rebuttal, Ex. 5, Page 40, Lines 14-16.

³⁹ Reed Direct, Ex. 1, Page 45, Lines 18-19.

⁴⁰ Reed Surrebuttal, Ex. 3, Pages 6-7, Lines 17-24, 1-3.

⁴¹ Transcript, Pages 202-203, Lines 14-25, 1-10.

⁴² Kirkland Rebuttal, Ex. 5, Page 40, Lines 19-22.

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human life. A shortage of capacity could require the curtailment of gas deliveries to some customers or even loss of service to all customers in an area.⁴³ If service were lost to an area, MGE would have to undertake a costly and time consuming process to shut off service lines, relight pilot lights, and check for leaks, before restoring service.⁴⁴ During this process, customers would be sitting in cold homes in what could be sub-zero temperatures. MGE's consultant estimated that such a capacity shortfall in the Kansas City area could cost MGE several hundred million dollars.⁴⁵

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law.

Jurisdiction

MGE is a public utility, and a gas corporation as those terms are defined in Section 386.020(18) and (42), RSMo 2000. As such, MGE is subject to the Commission's jurisdiction pursuant to Chapters 386 and 393, RSMo Supp. 2006.

Burden of Proof:

Section 393.130.1, RSMo Supp. 2006, requires that all charges made or demanded by any gas corporation be just and reasonable. Section 393.150.2, RSMo 2000, provides that in any hearing involving a rate increase, the gas corporation proposing such rate increase has the burden of proving that the proposed increased rate is just and reasonable. The Commission has also held that the gas corporation has the burden of showing that the gas costs that it proposes to pass on to ratepayers through operation of its PGA tariff are just and reasonable.⁴⁶

The Prudence Standard:

It is not, however, sufficient to state that MGE, as the gas corporation, has the burden of proving that its gas costs are just and reasonable. The fact that Staff is challenging the prudence of incurring some of those costs brings into effect an additional standard, the prudence standard.

The Commission established its prudence standard in a 1985 case involving the costs incurred by Union Electric Company in constructing its

⁴³ Kirkland Direct, Ex. 4, Page 9, Lines 8-11.

⁴⁴ Reed Rebuttal, Ex. 2, Page 35, Lines 4-19.

⁴⁵ Reed Rebuttal, Ex. 2, Page 37, Lines 1-8.

⁴⁶ In the Matter of Tariffs filed by Western Resources, Inc., d/b/a Gas Service, a Western Resources Company, to Reflect Rate Changes to be Reviewed in the Company's 1992-1993 Actual Cost Adjustment, 3 Mo. P.S.C. 3rd 480, 488 (1995).

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Callaway nuclear plant.⁴⁷ In determining how much of those costs were to be included in Union Electric's rate base, the Commission adopted a standard for determining the prudence of costs that had been established by the United States Court of Appeals, District of Columbia, in a 1981 case.⁴⁸ The standard adopted by the Commission recognizes that a utility's costs are presumed to be prudently incurred, and that a utility need not demonstrate in its case-in-chief that all expenditures are prudent. "However, where some other participant in the proceeding creates a serious doubt as to the prudence of an expenditure, then the applicant has the burden of dispelling those doubts and proving the questioned expenditures to have been prudent."⁴⁹

The Commission, in the Union Electric case, further recognized that the prudence standard is not based on hindsight, but upon a reasonableness standard. The Commission cited with approval a statement of the New York Public Service Commission that:

... the company's conduct should be judged by asking whether the conduct was reasonable at the time, under all the circumstances, considering that the company had to solve its problem prospectively rather than in reliance on hindsight. In effect, our responsibility is to determine how reasonable people would have performed the tasks that confronted the company.⁵⁰

Since its adoption, the Commission's prudence standard has been recognized by reviewing courts⁵¹ and has been accepted by all parties as the standard to be applied in this case.

DECISION

After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decision regarding the issue identified by the parties.

⁴⁷ In the Matter of the Determination of In-Service Criteria for the Union Electric Company's Callaway Nuclear Plant and Callaway Rate Base and Related Issues. In the Matter of Union Electric Company of St. Louis, Missouri, for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in the Missouri Service Area of the Company, 27 Mo. P.S.C. (N.S.) 183, 192-193 (1985).

⁴⁸ *Anaheim, Riverside, Etc. v. Fed. Energy Reg. Comm'n*, 669 F.2d 799, 809 (D.C. Cir. 1981).

⁴⁹ *Union Electric*, 27 Mo. P.S.C. (N.S.) 183, 193 (1985).

⁵⁰ *Union Electric*, at 194, quoting Consolidated Edison Company of New York, Inc., 45 P.U.R. 4th 331 (1982).

⁵¹ See, e.g. *State ex rel. Associated Natural Gas Company v. Pub. Serv. Comm'n*, 954 S.W.2d 520, 529 (Mo. App. W.D. 1997).

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Staff contends that MGE imprudently failed to properly analyze its pipeline capacity needs and for that reason failed to reduce its capacity to a level established by Staff's analysis. On that basis, Staff urges the Commission to disallow over \$4 million of MGE's costs for the two ACA periods under review.

Staff seems to base its proposed disallowance on the premise that MGE must prove that it properly documented its planning process and therefore acted imprudently in determining whether to reduce its pipeline capacity during these ACA periods. However, MGE's actions are presumed to be prudent, and it is Staff's burden to overcome that presumption of prudence by demonstrating a serious doubt about the prudence of those decisions. Staff has not met that burden.

Staff attempted to raise a serious doubt about MGE's planning process by contending that the company's planning process was sloppy and undocumented. In fact, MGE was able to demonstrate that its method of determining its capacity needs was documented and was well within the norms of the industry. The reasonableness of MGE's calculations were further demonstrated by the independent "best practices" evaluation performed by Concentric Energy Advisors, which demonstrated a capacity need in line with the need calculated by MGE. On the other hand, Staff's flawed calculations seriously underestimated the amount of pipeline capacity that MGE would need on a very cold day.

At most, Staff showed that MGE's decisions about pipeline capacity were conservative. Perhaps MGE's service area will never again experience the extreme cold temperatures that would create the gas demand predicted to occur on a design day. Perhaps MGE could save an average customer a few dollars per year by reducing its pipeline capacity. However, the cost of running short of gas on a design day is so staggeringly high that a conservative approach is the prudent approach.

Staff has failed to create a serious doubt about the prudence of MGE's actions and its proposed disallowance will be denied.

IT IS ORDERED THAT:

1. The disallowance proposed by Staff regarding excess pipeline capacity is denied.
2. MGE shall establish the appropriate account balances for its 2001-2002, and 2002-2003 actual cost adjustments.
3. This Report and Order shall become effective on October 12, 2007.

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Davis, Chm., Murray, Clayton, Appling
and Jarrett, CC., concur;
and certify compliance with the
provisions of Section 536.080, RSMo.

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Evidence, Practice and Procedure §30. The Commission concluded that the Respondent was not denied its right to an impartial decision maker when the Commission chose to hear additional oral arguments from the parties after those parties submitted post-hearing briefs.

Evidence, Practice and Procedure §30. The Commission granted an application for rehearing and modified its interpretation of a utility's tariff provision based solely on its reading of the language of the tariff.

**ORDER DENYING RESPONDENTS' APPLICATION FOR
REHEARING, MODIFYING REPORT AND ORDER IN RESPONSE TO
APPLICATIONS FOR REHEARING FILED BY THE MUNICIPAL GAS
ASSOCIATION AND AMERENUE, AND GRANTING CLARIFICATION**

On August 28, 2007, the Commission issued a Report and Order regarding Staff's complaint against Missouri Pipeline Company, LLC, and Missouri Gas Company, LLC. That Report and Order became effective on September 7. On September 6, the Respondents, Missouri Pipeline and Missouri Gas, filed an application for rehearing. On the same date, two intervening parties, the Municipal Gas Commission of Missouri and Union Electric Company d/b/a AmerenUE, filed their own applications for rehearing. In addition, the Commission's Staff filed a request for clarification. Staff filed a response to the applications for rehearing on September 17. No other party filed a response.

Missouri Pipeline and Missouri Gas raise many of the same arguments in their application for rehearing that the Commission rejected in its Report and Order. The Commission will not revisit those arguments. However, Missouri Pipeline and Missouri Gas also contend they were denied an impartial decision maker, in violation of their due process rights,

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because the Commission scheduled an oral argument after having reviewed the briefs submitted by the parties.

After beginning its deliberations at its public agenda meeting on June 26, 2007, the Commission was overwhelmed by the massive amount of evidence submitted into the record in this case. Seeking clarity, the Commission ordered the parties to present oral arguments on July 10, 2007. The Commission's June 26 order scheduling the oral argument explained:

The arguments will allow the attorneys representing the parties an opportunity to explain the evidence and the positions of their clients. The Commissioners also intend to question the attorneys about those matters. No new evidence will be taken.

Oral arguments were received on July 10. The entire proceeding occurred on the record and a transcript of the arguments is included in the record. Contrary to the insinuations of Missouri Pipeline and Missouri Gas, absolutely no new evidence or testimony was offered or received at the oral arguments. After gaining a better understanding of the record evidence from the arguments of the parties, the Commission voted, again at a public agenda meeting, to issue its Report and Order.

The Commission's rules allow the Commission to direct the parties to submit oral arguments as well as written briefs.¹ In ordering the parties to further explain their cases through the presentation of oral arguments, the Commission did nothing improper and did not display any bias against the Respondents. The Respondents have not been denied an impartial decision maker and their due process rights have been respected.

Section 386.500.1, RSMo (2000), indicates the Commission shall grant an application for rehearing if "in its judgment sufficient reason therefore be made to appear." Missouri Pipeline and Missouri Gas' application for rehearing fails to provide sufficient reason to grant rehearing and it will be denied.

The intervening parties, the Municipal Gas Association and AmerenUE, request rehearing regarding only one aspect of the Commission's decision. In its Conclusions of Law regarding Count III of Staff's complaint, the Commission interpreted Section 3.2b and c of Missouri Pipeline and Missouri Gas' tariffs as limiting the maximum transportation rate charged to a non-affiliated shipper to the lowest rate

¹ Commission Rule 4 CSR 240-2.140(1)

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charged to an affiliated shipper. The Municipal Gas Association and AmerenUE disagree with the Commission's conclusion that Section 3.2c automatically changes the tariff provision to allow those lower rates to go into effect only after the Commission's Staff gives notice of the lower rate to the Commission. Instead, they argue that Section 3.2b requires those lower rates to take effect immediately upon the offering of a lower rate to an affiliated shipper.

The Municipal Gas Association and AmerenUE interpret section 3.2b (1) of the tariff as establishing that the lowest rate charged to an affiliated shipper is the highest rate that can be charged to non-affiliated shippers. Subsections (2)-(5) of that section then establish a procedure by which Missouri Pipeline or Missouri Gas could obtain an exception to that rule by requesting Commission approval of specific agreements that would allow for the charging of a lower rate to an affiliated shipper. According to their interpretation, the purpose of section 3.2c is to allow Staff to eliminate the possibility that Missouri Pipeline or Missouri Gas could obtain an exception to the general rule by eliminating subsections (2)-(5). Therefore, if Staff brings section 3.2c into effect by giving notice to the Commission, the requirement that the lowest rate charged to an affiliated shipper becomes the highest rate that can be charged to a non-affiliated shipper becomes absolute, with no possible exceptions.

The Commission finds this interpretation of the tariff to be more reasonable than the interpretation described in its Report and Order in that it allows all provisions of the tariff to be given a reasonable effect. The Commission will modify its previously issued Report and Order to be consistent with this interpretation of the tariff.

The Commission emphasizes that its interpretation of the tariff is based entirely on its reading of the language of the tariff. No evidence was presented by any party that would allow the Commission to make any finding of fact regarding the appropriate interpretation of the tariff.

Staff did not request rehearing, but did file a request for clarification regarding the Commission's decision on Count V of Staff's complaint. Regarding that count, the Commission found that Staff failed to prove that Missouri Gas violated its certificate of convenience and necessity by constructing a new lateral line to serve an industrial customer. However, the Commission found that Missouri Gas violated its tariff by failing to demand reimbursement from the shipper for constructing that lateral line. The Commission then went on to explain that penalties were not appropriate for that tariff violation because Missouri Gas' failure to seek

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reimbursement did not have an impact on rates and therefore had not harmed Missouri Gas' other customers.

Staff pointed out that ordered paragraph 5 of the Report and Order simply states, "Staff failed to prove the allegations contained in Count V of its complaint and relief on that Count is denied." Staff asks the Commission to clarify that ordered paragraph to indicate that Staff did prove part of that Count.

Staff is correct. Ordered paragraph 5 of the Report and Order is clarified to provide that Staff failed to prove that Missouri Gas violated its certificate of convenience and necessity. Staff proved that Missouri Gas violated its tariff, but relief for that violation is denied.

IT IS ORDERED THAT:

1. The Application for Rehearing filed by Missouri Pipeline Company, LLC., and Missouri Gas Company, LLC., is denied.
2. In response to the Applications for Rehearing filed by the Municipal Gas Commission of Missouri and by Union Electric Company d/b/a AmerenUE, the Commission's Report and Order issued on August 28, 2007, is withdrawn and a revised Report and Order shall be issued.
3. This order shall become effective on October 4, 2007.

Davis, Chm., Clayton, Appling, Jarrett, CC., concur.
Murray, C., not participating.

Woodruff, Deputy Chief Regulatory Law Judge

NOTE: See pages 295 and 459 for another order in this case.

In the Matter of Missouri-American Water Company's Request for Authority to Implement a General Rate Increase for Water Service Provided in Missouri Service Areas

Case No. WR-2007-0216, et al.

Decided: October 4, 2007

Water §1. The cost allocation resulting from the compromises in the Global Agreement were reasonable. Joplin's position against the effect of the Agreement lacked support. Thus the Commission adopted the Agreement.

Water §1. The Commission accepted Staff's payroll and payroll tax annualization. The Staff calculated annualization values appropriately and Joplin failed to demonstrate how the values were miscalculated.

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APPEARANCES

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Leland B. Curtis, and **Carl J. Lumley**, Curtis, Heinz, Garrett & O'Keefe, P.C., 130 S. Bemiston, Suite 200, Clayton, Missouri 63105, for the City of Warrensburg, Missouri.

Byron E. Francis, and **J. Kent Lowry**, Armstrong Teasdale, L.L.P., One Metropolitan Square, Suite, 2600, St. Louis, Missouri 63102-2740 for the Metropolitan St. Louis Sewer District.

Lisa C. Langeneckert, The Stolar Partnership, L.L.P., 911 Washington Avenue, Suite 700, St. Louis, Missouri, for the Missouri Energy Group.

Diana Vuylsteke, Bryan Cave, L.L.P., 211 N. Broadway, Suite 3600, St. Louis, Missouri 63102, for the Missouri Industrial Energy Consumers.

Carole Iles, and **Edward F. Downey**, Bryan Cave, L.L.P., 221 Bolivar Street, Suite 101, Jefferson City, Missouri 65101, for the Missouri Industrial Energy Consumers.

James M. Fischer, and **Larry W. Dority**, Fischer & Dority, P.C., 101 Madison Street, Suite 400, Jefferson City, Missouri 65101, for Public Water Supply Districts Nos. 1 and 2 of Andrew County, Missouri, and Public Water Supply District No. 1 of DeKalb County, Missouri.

Sherrie A. Schroder, and **Michael A. Evans**, Hammond, Shinners, Turcotte, Larrew and Young, P.C., 7730 Carondelet Avenue, Suite 200, St.

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Louis, Missouri 63105, for the Utility Workers Union of America Local 335, AFL-CIO.

Laura Llorente, and **Robert Hess**, Husch & Eppenberger, L.L.C., 235 East high Street, Suite 3400, P.O. box 1251, Jefferson City, Missouri 65102, for Home Builders Association of St. Louis and Eastern Missouri, Inc.

Kevin Thompson, General Counsel, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

Christina L. Baker, Assistant Public Counsel, Office of the Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel.

REGULATORY LAW JUDGE: Harold Stearley

REPORT AND ORDER

Procedural History

Tariff Filings

On December 15, 2006, Missouri-American Water Company ("MAWC") submitted to the Missouri Public Service Commission certain proposed tariff sheets, Tariff File Numbers YW-2007-0407, YW-2007-0409, YW-2007-0410, YW-2007-0411, YW-2007-0412, and YW-2007-0413. This filing was docketed as Case Number WR-2007-0216, and the purpose of the filing, according to MAWC, is to implement a general rate increase for water service provided by the company. MAWC states that the revised water rates are designed to produce an additional \$41,387,823 in gross annual water revenues excluding gross receipts and sales taxes, a 24.8% increase over existing water revenues.

Also on December 15, MAWC filed certain tariff sheets designed to implement a general rate increase for sewer service provided by the company, Tariff File Numbers YS-2007-0415, YS-2007-0416, and YS-2007-0417. This filing was docketed as Case Number SR-2007-0217. MAWC states that the revised sewer rates are designed to produce an additional \$73,795 in gross annual sewer revenues excluding gross receipts and sales taxes, a 25.7% increase over existing sewer revenues.

The rate schedules attached to MAWC's tariff filings bore issue dates of December 15, 2006, with a proposed effective date of January 14, 2007. Together with its proposed tariff sheets and other minimum filing requirements, the Company also filed prepared direct testimony in support of its requested rate increases.

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Suspension Orders and Interventions

The Commission issued its Suspension Orders and Notices on January 3, 2007,¹ suspending the proposed water and sewer tariff sheets for 120 days plus six months from the original proposed effective date, that is, until November 14. In those orders, the Commission also set an evidentiary hearing and a deadline for intervention applications. Intervention was granted to AG Processing, Inc., the City of Jefferson, the City of Joplin, the City of Parkville, the City of St. Joseph, the City of Warrensburg, the Metropolitan St. Louis Sewer District, the Missouri Energy Group, the Missouri Industrial Energy Consumers, Public Water Supply Districts Numbers 1 and 2 of Andrew County, Public Water Supply District Number 1 of DeKalb County, and the Utility Workers Union of America Local 335, AFL-CIO.²

Consolidation of Cases

On January 17, pursuant to Commission Rule 4 CSR 240-2.110(3), the Commission issued its order consolidating Case Numbers WR-2007-0216 and SR-2007-0217. The Commission found that these cases involved related issues of fact and law supporting consolidation. The Commission designated Case Number WR-2007-0216 as the lead case and directed that all further pleadings in these matters be filed under that case number.

On February 22, the Commission adopted the procedural schedule jointly proposed by the parties. The procedural schedule included dates for the filing of prepared testimony, revised dates for the evidentiary hearing, and a briefing schedule.

On April 2, MAWC filed revised sewer tariffs that were filed for the purpose of implementing a capacity charge for its Warren County and Jefferson County sewer districts, Tariff File Numbers JS-2007-0713 and JS-2007-0714. These tariff filings were filed outside of the existing rate cases and docketed under Case Number ST-2007-0443. The Office of the Public Counsel ("OPC") filed a motion to suspend these new tariff filings and consolidate consideration of these tariffs into the existing rate case. The Home Builders Association of St. Louis and Eastern Missouri, Inc. ("HBA") filed objections to the tariff filings and was granted intervention.

¹ All dates following the date of the suspension order reference the year 2007 unless otherwise noted.

² All entities granted intervention in Case Number WR-2007-0216 were also granted intervention in Case Number SR-2007-0217.

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Ultimately on June 21, based upon a joint recommendation of all of the parties in this case, the Commission consolidated Case Number ST-2007-0443 with Case Number WR-2007-0216. The capacity charge tariffs were suspended to match the suspension date of the rate-case tariffs. In this manner the Commission can consider all related issues of fact and law between these matters and all relevant and interrelated factors, thus avoiding any possible specter of single-issue ratemaking. The Commission did not close ST-2007-0443, keeping that case open to receive filings specifically related to the capacity charge tariffs. The consolidation of these cases brought the HBA as a party into the existing rate cases.

Local Public Hearings

Between the dates of June 5 and June 14, pursuant to notice provided by the company to all of its customers, the Commission convened local public hearings for Case Numbers WR-2007-0216 and SR-2007-0217 within MAWC's service territory, at Hillsboro, Joplin, Kirkwood, Mexico, Parkville, St. Charles, St. Joseph, St. Louis, Warrensburg, and Warrenton.³ The Commission heard the testimony of 40 witnesses at these local public hearings and received 3 exhibits into evidence.

Pre-Hearing Stipulation and Agreement between the Metropolitan St. Louis Sewer District and MAWC

On July 16, MAWC and the Metropolitan St. Louis Sewer District (MSD) jointly filed a stipulation and agreement to settle the MSD rate design issue. The issues addressed by this agreement related to the provision of water usage meter reading data and customer billing information and related services to MSD by MAWC, and the amount charged by MAWC for provision of this information. No party objected, and the stipulation became unanimous by operation of Commission rule on July 24.⁴ Consequently, the Commission approved that stipulation and agreement by separate order dated September 20, 2007, bearing an effective date of September 30, 2007.

Evidentiary Hearing – Preliminary Stage

Pursuant to the procedural schedule, the Commission convened an evidentiary hearing beginning on August 6 at its offices in Jefferson City, Missouri. On this first day of hearing the parties informed the Commission

³ These local public hearings were completed prior to the consolidation order joining Case Number ST-2007-0443 to the general rate cases. Consequently, these local public hearings did not yield testimony on the capacity charge tariffs being considered in Case Number ST-2007-0443.

⁴ Commission Rule 4 CSR 240-2.115(2)(C).

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that the majority of the parties were entering into a Stipulation and Agreement as to all of the issues to be decided in this matter. Only the City of Joplin ("Joplin") objected to the agreement.⁵

Joplin identified four issues it disputed in its prehearing brief, and in the testimony of its witness Ms. Leslie Jones.⁶ Joplin requested hearing dates to offer evidence and cross-examine witnesses on these issues. Based upon Joplin's request, proceedings were continued to August 14 and 15 to hear Joplin's evidence.

Global Stipulation and Agreement and City of Joplin's Objections

On August 9, prior to the resumption of the hearings, numerous parties filed a global Non-Unanimous Stipulation and Agreement ("Global Agreement") resolving all issues in this matter. The only non-signatory parties to the Global Agreement were Joplin, the City of Jefferson ("Jefferson City"), the City of St. Joseph ("St. Joseph") and the Utility Workers of America Local 335, AFL-CIO ("Local 335"). All parties were given the opportunity to file suggestions in support or in opposition to the Agreement. The original deadline for suggestions was subsequently extended to ensure adequate opportunity for all of the parties to respond.⁷

Joplin was the only non-signatory to the Global Agreement that objected to the agreement. Consequently, the Commission directed Joplin to further clarify the issues it disputed, identify the witnesses it wished to present and cross-examine with regard to those issues and update its prehearing brief if required. On August 10, Joplin identified, with particularity, the following issues for the hearing set to resume on August 14 and 15:

- (1) The Proper Basis for Allocation of MAWC's Corporate Administrative and General Expenses;
- (2) the Proper Method of Payroll Tax Normalization/Annualization;

⁵ On August 6, 2007, Utility Workers Union of America Local 335, AFL-CIO Local 335, the Missouri Energy Group and the City of Jefferson made no appearance.

⁶ Leslie Jones is the Finance Director for the City of Joplin. Hearing Exh. Joplin-1, Prefiled Rebuttal Testimony of Leslie Jones, p. 2-3.

⁷ Order Directing the City of Joplin to Make Specific Filings, Resetting Hearing Schedule and Directing Response to Stipulation and Agreement, issued August 9, 2007; Order Extending Deadline for Filing Suggestions Regarding the Non-Unanimous Stipulation and Agreement, Setting Briefing Schedule, Ordering Proposed Findings of Fact and Conclusions of Law, Directing the Filing of Late-Filed Exhibits and Responses, and Addressing other Procedural Matters, issued August 15, 2007. Transcript pp. 107-108.

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- (3) the Proper Allocation of Corporate Depreciation;
and,
- (4) the Proper Normalization/Annualization of
Chemicals for Treating Water in the Joplin
District.⁸

Joplin further stated that, at that time, it did not oppose the resolution of any additional issues encompassed in the Global Agreement, and identified the following witnesses it wished to present, or to have appear, at hearing for cross-examination: Joplin's Witness Leslie Jones; Staff Witnesses Steve Rackers, Roberta Grissum and Lisa Hanneken; and MAWC's Witnesses Ed Grubb, Don Petry and Greg Weeks.⁹ No other party identified any other witness it wished to be present at hearing for cross-examination.¹⁰

Resumption of Evidentiary Hearing and Post-Hearing Submissions

The evidentiary hearing resumed as scheduled on August 14 and concluded that same day.¹¹ MAWC's first witness, Mr. Edward J. Grubb, began his testimony with a correction to the calculation of the amount of chemical expense attributable to the Joplin District. This correction was not objected to by any other party and resolved this issue completely.¹² Because of this correction, and Staff's stipulation that the

⁸ List of Disputed Issues and Witnesses, filed August 10, 2007.

⁹ Id.

¹⁰ While the Commission cannot cite to non-existent pleadings to prove a negative, a review of the docket sheet and the transcript confirms that no other party identified additional witnesses to provide testimony during the hearing.

¹¹ On August 14, 2007, Utility Workers Union of America Local 335, AFL-CIO Local 335, the Missouri Energy Group and the Metropolitan St. Louis Sewer District made no appearance. Additionally, several parties who were present asked for permission to be able to come and go as necessary for their participation. These parties were granted such leave but all were advised that if they were absent during the time that a scheduled witness was testifying that they would be considered to have waived cross-examination of that witness. Those parties all agreed that their absence would constitute a waiver of cross-examination. Transcript pp. 102-107. See, in particular Transcript p. 105, lines 20-23, p. 107, lines 3-11.

¹² Transcript pp. 148-154. In annualizing the amount of chemical expense, the MAWC determined the annual amount of water it expects to treat and multiplies it by the usage (per million gallons) of chemicals needed to treat the water. That product is multiplied by the price per pound of the chemical, which price is based upon contracts with chemical suppliers. (Tr. 150) In annualizing the amount of chemical expense for the Joplin District, MAWC found that the number of pounds needed to treat an annualized level of water for three of the eleven

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correction for chemical expense would reduce Joplin's portion of MAWC's revenue requirement by \$236,416, the appearing parties mutually agreed that no cross-examination was required of Staff's witness Roberta Grissum, and MAWC's witness Greg A. Weeks. Consequently, they were excused from the witness list and the parties waived cross-examination as to these witnesses regarding any and all issues.¹³

With one exception, no party objected to the admission of prefiled testimony from any witness not requested to appear. MAWC objected to the prefiled rebuttal testimony of Alan Ratterman. Objections were sustained to Mr. Ratterman's testimony and it was excluded from the record.¹⁴ Ultimately, all parties waived cross-examination of all of the witnesses not requested to appear on August 14.¹⁵

chemicals used in the Joplin District was overstated. As a result, the annualized chemical expense for the Joplin District was overstated by \$236,416. (Tr. 150) In order to correct for this error, MAWC proposed to take the amount of revenue increase attributable to Joplin, pursuant to the Global Agreement and reduce it by \$236,416. (Tr. 151) This has the additional impact of reducing the overall revenue requirement sought by MAWC by \$236,416, or reducing the overall increase to \$28,463,584.

¹³ Transcript p. 208.

¹⁴ Mr. Ratermann was a witness for the Utility Workers Union of America, Local 335 ("Local 335"). Mr. Ratermann's rebuttal testimony focused on asbestos-cement pipe removal, which he believed concerned the "health and safety of consumers and employees" of MAWC, and he advocated for insuring that adequate funds from the requested rate increase were allocated to address these health and safety issues. However, Commission Rule 4 CSR 240-2.130(7)(B) is not ambiguous and states that "where all parties file direct testimony, rebuttal testimony shall include all testimony which is responsive to the testimony and exhibits contained in any other party's direct testimony." Mr. Ratermann's rebuttal testimony violates this rule in that it fails to respond to the direct testimony of any party. Mr. Ratermann failed to raise this issue in direct testimony and failed to raise this issue when he testified before the Commission at a local public hearing in this case on June 13, 2007, in Kirkwood. Tr. Vol. 9, p. 9-11. While Local 335 filed a written response to MAWC's objections that were first raised in a Motion to Strike filed on July 31, Local 335's response was not persuasive. Local 335 made no appearance at hearing to formally offer the Mr. Ratermann's rebuttal testimony into the record or to provide further argument in support of submission of this testimony. Finding Mr. Ratermann's prefiled rebuttal testimony to be improper under the Commission's rules; the Commission sustained the objections to its admission and excluded it from the record.

¹⁵ During the hearing, the Commission noted that it was not finally excusing witnesses in the event that other issues (issues other than those identified by the parties and adopted by the Commission) materialized during the hearing that would require the taking of additional testimony. (Transcript pp. 103, 108, 432-433.) The parties were provided with multiple opportunities to identify the issues in this matter and elicit witness testimony and cross-examination on those issues. No additional issues were identified by the parties other than those adopted by Commission Notice and Order. (See *Order Granting Motion to Modify Order and Amend Issues List*, issued August 30, 2007, and *Notice Regarding Issues List*, issued September 5, 2007.) No party requested a hearing on any issue other than those contested at the evidentiary hearing completed on August 14, 2007. No party has requested that any other

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Joplin's witness, Ms. Leslie Jones, was allowed to offer new direct testimony that advocated multiple changes in Joplin's original position. Consequently, as part of the post-hearing procedural schedule, the Commission directed Joplin to file a revised list of its issues and to provide certain exhibits to be filed as late-filed exhibits pursuant to the Commission's traditional practice.¹⁶ The remaining parties were given the opportunity to file objections to these exhibits, as well as given the opportunity to submit rebuttal testimony to Ms. Jones's new adduced testimony.¹⁷ No party objected to any of the exhibits once they were submitted in their final form and they were received into the record for all purposes.¹⁸

No party submitted rebuttal testimony to Ms. Jones's live testimony.

In total, the Commission admitted the prefiled testimony of 26 witnesses, heard cross-examination testimony from 4 of those same witnesses, received new testimony from and allowed cross-examination of Joplin's sole witness, and received 75 exhibits into evidence. The Commission wishes to emphasize that a full hearing was held on all of the issues for which a hearing was requested.¹⁹

witness, other than those testifying at the hearing, provide additional testimony or be subject to cross-examination. The Commission determined the case was finally submitted for decision on September 17, 2007 and that it requires no additional testimony to decide the issues in controversy. Consequently, the Commission shall finally excuse all witnesses to this matter as part of this Report and Order.

¹⁶ Commission Rules 4 CSR 240-2-1.30(14) and (17).

¹⁷ Transcript pp. 352, 422, 424-426. Order Extending Deadline for Filing Suggestions Regarding the Non-Unanimous Stipulation and Agreement, Setting Briefing Schedule, Ordering Proposed Findings of Fact and Conclusions of Law, Directing the Filing of Late-Filed Exhibits and Responses, and Addressing other Procedural Matters, issued August 15, 2007. Order Clarifying Post-Hearing Procedural Schedule, issued August 20, 2007.

¹⁸ Joplin submitted an amendment to their late-filed exhibit, Joplin-2, on August 24. Joplin had amended their original filing by attaching four pages of a confidential settlement agreement that had been circulated among the non-MAWC parties prior to hearing. Objections to the amended exhibit were lodged by OPC and AGP. Those objections were sustained and the amended exhibit was stricken from the record. See Commission's "Order Extending Time for Responses to Late-Filed Exhibits and Striking Amendment to Late-Filed Exhibit," effective date of August 27, 2007. See also Commission's *Order Admitting Post-hearing Exhibits into Evidence and Acknowledging Parties' Waivers of Providing Rebuttal Testimony to the City of Joplin's Supplemental Direct Testimony at Hearing*, issued August 29.

¹⁹ As a matter of due process, the Commission allowed all of the parties the full and fair opportunity for a hearing on the issues they identified as being contested before the Commission. All of the parties to this action were given multiple opportunities to identify any disputed issues, the witnesses it desired to present with regard to those issues and the witnesses it desired to cross-examine. This case does not present any of the same issues as were identified in *State ex rel. James M. Fischer v. Public Service Commission of Missouri*,

Joplin's Post-Hearing Filings

On August 17, Joplin filed its revised list of disputed issues and its revised positions on those issues. Joplin identified its new positions as follows:²⁰

- (1) The Proper Basis for Allocation of MAWC's Corporate Administrative and General Expenses – Worker's Compensation, injuries and damages, Other Post-Employment Benefits ("OPEB") and pensions should be allocated based upon payroll, which is how they are allocated pursuant to the Global Agreement. Joplin no longer disputes this issue.
- (2) The Proper Basis for Allocation of MAWC's Corporate Administrative and General Expenses – all other administrative and general expenses should be allocated based upon total number of customers as opposed to payroll, which is how they are allocated pursuant to the Global Agreement.
- (3) The Proper Basis for Allocation of MAWC's Corporate Customer Accounts Expenses – those allocated from corporate accounts to the districts should be allocated based upon the total number of customers as opposed to payroll, which is how they are allocated pursuant to the Global Agreement.
- (4) The Proper Allocation of Corporate Depreciation – should be allocated to the districts

645 S.W.2d 39 (Mo. App. 1982). In *Fischer*, the Commission allowed OPC the opportunity to present a proposal for a gas company's rate design and to cross-examine opposing witnesses; however, it had previously decided that the only issue it would consider was whether to approve a stipulation and agreement submitted by all parties except OPC, thus negating the meaningfulness of the hearing. In this case, the Commission made no such prior decision, and did not prejudice any element or issue presented. As the remainder of the Report and Order demonstrates, the Commission thoroughly complied with its statutorily mandated fact-finding requirements and based its decision on substantial and competent evidence on the record as a whole.

²⁰ Revised List of Disputed Issues, filed by Joplin on August 17, 2007.

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based upon length of main as opposed to payroll, which is how they are allocated pursuant to the Global Agreement.

(5) The Proper Allocation of Corporate and other General Taxes -- should be allocated based upon the total number of customers as opposed to payroll, which is how they are allocated pursuant to the Global Agreement.

(6) The Proper Normalization/Annualization of Chemicals for Treating Water in the Joplin District – MAWC revised its calculations on this factor and this issue is no longer in dispute. (See FN 8).

(7) The Proper Method of Payroll Tax Normalization/Annualization – corporate payroll was annualized from \$289,000 in actual corporate payroll (in administrative and general expenses category) to add \$700,000.²¹

Joplin stated in its August 17 pleading that, “at this time,” it did not oppose the resolution of any additional issues encompassed in the Global Agreement.²²

Post-Hearing Stipulation and Agreement between Jefferson City and MAWC

On August 23, the City of Jefferson (“Jefferson City”), MAWC, Staff, and OPC jointly filed a Stipulation and Agreement to resolve separate issues Jefferson City had with MAWC concerning fire suppression and certain infrastructure improvements; specifically, back-up power generation, water storage and

²¹ In its August 17, 2007 pleading Joplin maintained that the increase was not supported by any fact and that as currently calculated the amount is overstated. On August 22, 2007, Joplin filed its *Statement of Filing of Calculations by the City of Joplin*. In this filing, Joplin acknowledged that: “Additionally, there is no direct revenue impact upon the payroll tax annualization and payroll annualization discussed in Leslie Jones’ testimony on August 14, 2007.”

²² *Revised List of Disputed Issues*, filed by Joplin on August 17, 2007.

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small main replacement.²³ No party objected and the stipulation became unanimous by operation of Commission rule on August 31.²⁴ The Commission reviewed the agreement, found it to be reasonable and approved that stipulation and agreement by separate order dated September 6, 2007, bearing an effective date of September 16, 2007.

Case Submission

The parties filed late-exhibits, briefs, reply briefs and proposed findings of fact and conclusions of law according to the post-hearing procedural schedule. The last briefs were filed on September 17 and the case was deemed submitted for the Commission's decision on that date.²⁵

Discussion of Issues Requiring Decision by Commission

On August 1, as required by the procedural schedule, the parties jointly filed a list of issues to be determined by the Commission. Each party was allowed the opportunity to file a statement of its position with respect to each issue. On August 2, AG Processing, Inc. filed an amendment to the issues list, and on August 23, the Commission formally adopted the unopposed issues list, as amended.²⁶

On August 29, all of the parties, with the exception of Local 335, filed a motion with the Commission to modify the issues list. The parties moving to modify had condensed Joplin's revised list of issues into two issues. Specifically, the moving parties including Joplin affirmatively asserted and conceded that the only two issues requiring a decision by the Commission were:

1. The proper basis for allocating MAWC's corporate expenses to the various districts, to include administrative and general expenses, customer accounts, depreciation, and other general taxes; and,

²³ The signatory parties to this stipulation and agreement stated: "As a result of this Stipulation, no changes shall need to be made to the Nonunanimous Stipulation and Agreement filed previously in this case on August 9, 2007.

²⁴ Commission Rule 4 CSR 240-2.115(2)(C).

²⁵ "The record of a case shall stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument." Commission Rule 4 CSR 240-2.150(1). Two Post-Submission motions were filed in this matter. MAWC moved the Commission to strike Local 335's Proposed Findings of Fact and Conclusions of Law on September 19, 2007, and Joplin moved the Commission to compel its Staff to provide additional information in response to the Commission's September 10, 2007 order directing certain filings. The Commission shall rule on these motions in later portions of this Report and Order.

²⁶ The original issues list, as formulated by the parties and adopted by the Commission, identified thirty-eight contested issues for Commission determination.

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2. Payroll tax payment as annualized for the Joplin District and certain depreciation issues.²⁷

The moving parties further affirmatively stated: "None of the other issues addressed by the Global Agreement [filed on August 9, 2007] have been objected to or are in dispute."²⁸

On September 4, Local 335 advised the Commission that they had not joined in the request to amend the issues list and considered three issues it raised during the course of this proceeding to be live issues in addition to the modified issues list as delineated above. Those issues were:

1. whether MAWC has provided adequate training of its employees in dealing with asbestos-cement and lead-jointed pipe;
2. whether funds should be allocated to employee training or the removal of asbestos-cement and lead-jointed pipe; and
3. whether MAWC has properly asserted privilege with regard to payroll information.²⁹

Local 335 reiterated that it did not oppose the outcome of the case as proposed in the Global Agreement, and that it recognized that the issues it raised may not be outcome determinative for this matter.³⁰

Ultimately, the Commission adopted the revised list of issues submitted on August 29, but also advised the parties that it would consider any record evidence on the issues identified by Local 335 when issuing its decision in this matter.³¹ The Commission will therefore review the

²⁷ Amended List of Issues and Motion to Modify Order, filed August 29, 2007.

²⁸ *Id.*

²⁹ *Advice to the Commission*, filed September 4, 2007.

³⁰ *Id.*

³¹ See *Order Granting Motion to Modify Order and Amend Issues List*, issued August 30, 2007, and *Notice Regarding Issues List*, issued September 5, 2007. The Commission adopts the list of issues with the caveat that the parties' framing of the issues may not accurately reflect the material issues under the applicable statutes and rules. On September 17, 2007, Local 335 filed proposed findings of Fact and Conclusions of Law pursuant to the Commission's post-hearing procedural schedule. On September 19, 2007, MAWC moved to strike Local 335's filing asserting that there was no record evidence for the Commission to consider in regard to Local 335's allegedly "live issue," and that, consequently, the Commission should strike Local 335 proposed findings and conclusions. The Commission shall consider this motion in a later part of this Order.

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competent and substantial evidence on the record as a whole to render decisions on the only issues identified in this matter that require a Commission decision. The Commission will also make all statutorily required findings and conclusions to fulfill its duty to set "just and reasonable" rates for MAWC's water and sewer services.

Findings of Fact and Conclusions of Law

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact and conclusions of law. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision. When making findings of fact based upon witness testimony, the Commission will assign the appropriate weight to the testimony of each witness based upon their qualifications, expertise and credibility with regard to the attested to subject matter.

In making its Findings of Fact and Conclusions of Law, the Commission is mindful that it is required, after a hearing, to "make a report in writing in respect thereto, which shall state the conclusion of the commission, together with its decision, order or requirement in the premises."³² Because Section 386.420 does not explain what constitutes adequate findings of fact, Missouri courts have turned to Section 536.090, which applies to "every decision and order in a contested case," to fill in the gaps of Section 386.420.³³ Section 536.090 provides, in pertinent part:

Every decision and order in a contested case shall be in writing, and . . . the decision . . . shall include or be accompanied by findings of fact and conclusions of law. The findings of fact shall be stated separately from the conclusions of law and shall include a concise statement of the findings on which the agency bases its order.

³² Section 386.420.2, RSMo 2000. All further statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

³³ St. ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n of Mo., 103 S.W.3d 813, 816 (Mo. App. 2003); St. ex rel. Noranda Aluminum, Inc. v. Pub. Serv. Comm'n, 24 S.W.3d 243, 245 (Mo. App. 2000).

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Missouri courts have not adopted a bright-line standard for determining the adequacy of findings of fact.³⁴ Nonetheless, the following formulation is often cited:

The most reasonable and practical standard is to require that the findings of fact be sufficiently definite and certain or specific under the circumstances of the particular case to enable the court to review the decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence.³⁵

Findings of fact are inadequate when they "leave the reviewing court to speculate as to what part of the evidence the [Commission] believed and found to be true and what part it rejected."³⁶ Findings of fact are also inadequate that "provide no insight into how controlling issues were resolved" or that are "completely conclusory."³⁷

With these points in mind, the Commission renders the following Findings of Fact and Conclusions of Law. Findings of Fact are sequentially numbered. Conclusions of Law appear in designated sections.

Findings of Fact and Conclusions of Law Common to all Issues

Findings of Fact Regarding the Parties

1. Missouri American Water Company ("MAWC") is a Missouri corporation with its principal office and place of business at 727 Craig Road, St. Louis, Missouri 63141.³⁸

2. MAWC currently provides water service to the public in and around the cities of Brunswick, Jefferson City, Joplin, Mexico, Parkville, Riverside, St. Joseph, Warrensburg, and parts of Lincoln, Platte, St. Charles, St. Louis, and Warren Counties, Missouri.³⁹

³⁴ *Glasnapp v. State Banking Bd.*, 545 S.W.2d 382, 387 (Mo. App. 1976).

³⁵ *Id.* (quoting 2 Am.Jur.2d *Administrative Law* § 455, at 268).

³⁶ *St. ex rel. Int'l. Telecharge, Inc. v. Mo. Pub. Serv. Comm'n*, 806 S.W.2d 680, 684 (Mo. App. 1991) (quoting *St. ex rel. Am. Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 701 S.W.2d 745, 754 (Mo. App. 1985)).

³⁷ *St. ex rel. Monsanto Co. v. Pub. Serv. Comm'n*, 716 S.W.2d 791, 795 (Mo. banc 1986) (relying on *St. ex rel. Rice v. Pub. Serv. Comm'n*, 359 Mo. 109, 220 S.W.2d 61 (1949)).

³⁸ See *Dione C. Joyner v. Missouri-American Water Company*, Case No. WC-2006-0345, 2006 WL 3610803 (Mo. P.S.C.).

³⁹ See MAWC's Tariffs: P.S.C. MO. No. 1 (St. Joseph), Tariff Tracking Number JW-2003-0034; P.S.C. MO. No. 2 (Joplin and Vicinity), Tariff Tracking Number JW-2003-1675; P.S.C. MO No. 2 (Missouri Cities: Brunswick, Mexico, Warrensburg and Adjacent Areas and Certificated Areas in St. Cahries and Platte Counties), Tariff Tracking Number JW-2003-1675; P.S.C. MO. No. 3

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3. MAWC currently provides sewer service to the public in and around the cities of Cedar Hill and Parkville and Warren County, Missouri.⁴⁰

4. MAWC provides water service to approximately 459,000 customers and sewer service to approximately 1,000 customers.⁴¹

5. Intervenor Utility Workers Union of America Local 335, AFL-CIO Local 335 ("Local 335") is a labor organization representing approximately 300 employees of MAWC in two bargaining units, one of which establishes the terms and conditions of employment for the clerical employees, and the other of which establishes the terms and conditions of employment for the "physical" employees.⁴² Local 335 is an unincorporated association; however, because labor unions are not required to register their names as fictitious names with the Missouri Secretary of State, Local 335 does not have evidence of any such registration. Further, Local 335 does not have an office or place of business in any traditional sense; however, persons wishing to contact Local 335 may contact the union through its president Clara Faatz at MAWC's offices.⁴³

6. Intervenor City of Joplin, Missouri ("Joplin"), is a municipality located in Jasper County, Missouri, and receives its water service from MAWC. The City of Joplin also represents the interests of its citizens, who likewise receive their water service from MAWC.⁴⁴

(Jefferson City), Tariff Tracking Number JW-2003-0024; P.S.C. MO No. 6 (St. Louis and Jefferson County), Tariff Tracking Numbers JW-2002-0137 and YW-2005-0662, Case Number WO-2005-0286; P.S.C. MO No. 7 (Incline Village Subdivision and Adjacent Certificated Service Areas, Warren County), Tariff Tracking Number YW-2005-0180, Case Number WM-2004-0122. See also *Dione C. Joyner v. Missouri-American Water Company*, Case No. WC-2006-0345, 2006 WL 3610803 (Mo. P.S.C.).

⁴⁰ See MAWC's Tariffs: P.S.C. MO No. 8 (Cedar Hill), Tariff Tracking Number YS-2005-0267, Case Number SM-2004-0275; P.S.C. MO No. 2 (Parkville, Platte County), Tariff Tracking Number JS-2003-0033; P.S.C. MO No. 7 (Incline Village Subdivision and Adjacent Certificated Service Areas, Warren County), Tariff Tracking Number YS-2005-0188, Case Number WM-2004-0122.

⁴¹ See MAWC's Petition to Change its Infrastructure Systems Replacement Surcharge, Case No. WO-2007-0043, p. 2, paragraph 2.

⁴² *Verified Application of UWUA Local 335 to Intervene*, p. 1, paragraph 2, filed January 4, 2007. The "physical" bargaining unit includes all MAWC's production, construction, maintenance, operation and distribution employees. *Id.* at paragraph 2. Note: Commission Rule 4 CSR 240-2.080(7) and Supreme Court Rule 55.03(b) provide that when a party presents a claim, defense, request, demand, objection, contention, or argument in a pleading or other paper filed or submitted to the adjudicatory body, signed by the party or their attorney, that they are certifying to the best of the signer's knowledge, information, and belief that any allegations or factual contentions have evidentiary support.

⁴³ *Id.*, p. 1-2, paragraph 3.

⁴⁴ *Application to Intervene of City of Joplin, Missouri*, p. 1, paragraph 1, filed January 10, 2007.

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7. Intervenor AG Processing, Inc. ("AGP") is an agricultural cooperative and is a large manufacturer and processor of soybean meal, soy-related food products, and other grain products throughout the central and upper Midwest, including the State of Missouri. AGP is the largest cooperative soybean processing company in the world, the third-largest supplier of refined vegetable oil in the United States and the third-largest commercial feed manufacturer in North America.⁴⁵ AGP operates a major processing facility in St. Joseph, Missouri where it is a major industrial water supply customer of MAWC in the St. Joseph District.⁴⁶

8. Intervenor Missouri Energy Group ("MEG") is an ad hoc group of not-for-profit hospital systems located within the state of Missouri that have purchased substantial amounts of water from MAWC and who have actively participated in previous cases involving MAWC and its predecessor, St. Louis County Water Company.⁴⁷

9. Interveners Public Water Supply District Numbers 1 and 2 of Andrew County and Public Water Supply District Number 1 of DeKalb County (collectively "Water Districts") are political subdivisions of the State of Missouri who are customers of MAWC, purchasing water from MAWC for distribution and resale to their own customers.⁴⁸

10. Intervenor City of Warrensburg, Missouri ("Warrensburg") is a third class municipality situated in Johnson County, Missouri. Its City Hall is located at 102 S. Holden, Warrensburg, Missouri 64093. The City receives water service from MAWC.⁴⁹

11. Intervenor City of St. Joseph, Missouri ("St. Joseph") is a municipality of the State of Missouri located in Buchanan County with its principal place of business address located at City Hall, 1100 Frederick Avenue, St. Joseph, Missouri 64501. St. Joseph is a large consumer of water supplied by MAWC, and it represents the residents and commercial interests of the City of St. Joseph.⁵⁰

⁴⁵ Application to Intervene of AG Processing, Inc., A Cooperative, p. 1, paragraphs 1, filed January 10, 2007.

⁴⁶ *Id.* at paragraphs 2.

⁴⁷ Application to Intervene of the Missouri Energy Group, p. 1, paragraph 1, filed January 12, 2007.

⁴⁸ *Application to Intervene*, page 2, paragraphs 2-3, filed January 16, 2007.

⁴⁹ Application to Intervene for City of Warrensburg, p. 1, paragraph 1, filed January 12, 2007.

⁵⁰ *Application to Intervene*, p. 1, paragraphs 1 and 4, filed January 16, 2007.

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12. Intervenor Missouri Industrial Energy Consumers ("MIEC") is a group of large customers of Missouri-American Water Company. MIEC includes the Boeing Company, DaimlerChrysler, GKN, Hussmann Refrigeration, Monsanto Company and Pfizer.⁵¹

13. Intervenor Metropolitan St. Louis Sewer District ("MSD") is a political subdivision of the State of Missouri and municipal corporation situated in the City of St. Louis, which provides an integrated sewer system for single and multi-family residences and commercial and industrial customers throughout the City of St. Louis and most of St. Louis County. MSD's address is 2350 Market Street, St. Louis, MO 63103.⁵²

14. Intervenor City of Jefferson, Missouri ("Jefferson City") is a municipality of the State of Missouri and a customer of MAWC.⁵³

15. Intervenor City of Parkville, Missouri ("Parkville") is a municipality located in Platte County and the City and its residents and businesses receive water from MAWC through its Parkville District.⁵⁴

16. Intervenor Home Builders Association of Greater St. Louis, and Eastern Missouri, Inc. ("HBA"), from consolidated case ST-2007-0443, is a not-for profit Missouri Corporation with over 1,300 members comprised of builders, developers, and others associated with the development and shelter industry in the St. Louis metropolitan area, including St. Louis City, and the counties of St. Louis, St. Charles, Jefferson, Franklin, Warren, Lincoln and Washington. HBA's members are directly impacted by the

⁵¹ Application to Intervene of the Missouri Industrial Energy Consumers, p. 1, paragraph 1 filed January 16, 2007.

⁵² Metropolitan St. Louis Sewer District's Application to Intervene, p. 1, paragraph 1, filed January 16, 2007.

⁵³ Application to Intervene, p. 1-2, paragraphs 1 and 4, filed January 16, 2007.

⁵⁴ Application to Intervene of City of Parkville, p. 1, paragraph 1, filed February 8, 2007. On August 14, 2007, when Parkville entered its appearance on the second day of the evidentiary hearing, its attorney stated that it would also like to enter an appearance for other entities that had joined it. Parkville proceeded to enter an appearance, without objection, for the City of Lake Waukomia, Public Water Supply District No. 6 of Platte County, Park University and the National Golf Club. Transcript p. 99, lines 23-25, p. 100, lines 1-5. Jeremiah Finnegan, Attorney at Law, of the law firm Finnegan, Conrad & Peterson, 3100 Broadway, Suite 1209, Kansas City, Missouri 64111 entered the appearance for these entities. The Commission notes that none of these entities formally sought intervention in this matter, nor were they granted intervention. Mr. Finnegan is a signatory to the Non-Unanimous Stipulation and Agreement, filed in this case on August 9, 2007, in his representative capacity for the City of Parkville. It is unclear if Mr. Finnegan intended to bind the additional entities he entered an appearance for, but none of those entities filed objections to the Agreement. Also, being a non-unanimous agreement, no party is bound by it. Commission Rule 4 CSR 240-2.115(2)(D).

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rates, charges, terms and conditions of sewer services provided by MAWC.⁵⁵

17. The Public Counsel is appointed by the Director of the Missouri Department of Economic Development and “may represent and protect the interests of the public in any proceeding before or appeal from the public service commission.”⁵⁶ Public Counsel “shall have discretion to represent or refrain from representing the public in any proceeding.”⁵⁷

18. The General Counsel of the Missouri Public Service Commission “represent[s] and appear[s] for the commission in all actions and proceedings involving any question under this or any other law, or under or in reference to any act, order, decision or proceeding of the commission . . .”⁵⁸

Conclusions of Law as to Jurisdiction

The record establishes that MAWC provides water and sewer service to a large customer base located throughout various cities and counties in the state of Missouri. The Commission concludes that MAWC is a “water corporation,” a “sewer corporation” and a “public utility” as those terms are defined in Sections 386.020(58), 386.020(48) and 386.020(42) respectively.⁵⁹ Consequently, MAWC is subject to the jurisdiction, control and supervision of the Commission.⁶⁰ The Commission has jurisdiction over MAWC’s services, activities, and rates pursuant to Section 386.250 and Chapter 393.

⁵⁵ *Objection and Request for Suspension of Tariff Filings*, p. 1, paragraph 1, filed in Case No. ST-2007-0443 on May 25, 2007; *Motion to Confirm Party Status or, In the Alternative, for Leave to Intervene*, p. 1, paragraph 1, filed June 7, 2007.

⁵⁶ Sections 386.700 and 386.710(2), RSMo 2000; Commission Rules 4 CSR 240-2.010(16) and 4 CSR 240-2.040(2).

⁵⁷ Section 386.710(3), RSMo 2000; Commission Rules 4 CSR 240-2.010(16) and 4 CSR 240-2.040(2). Public Counsel “shall consider in exercising his discretion the importance and the extent of the public interest involved and whether that interest would be adequately represented without the action of his office. If the public counsel determines that there are conflicting public interests involved in a particular matter, he may choose to represent one such interest based upon the considerations of this section, to represent no interest in that matter, or to represent one interest and certify to the director of the department of economic development that there is a significant public interest which he cannot represent without creating a conflict of interest and which will not be protected by any party to the proceeding.” *Id.*

⁵⁸ Section 386.071, RSMo 2000; Commission Rules 4 CSR 240-2.010(8) and 4 CSR 240-2.040(1).

⁵⁹ All statutory references are to RSMo 2000 unless otherwise noted. MAWC is also a “water corporation” as defined in 393.1000(7). See Findings of Fact Numbers 1-4.

⁶⁰ Exhibit MAWC-1, Ahern Direct, p. 16; See also *Dione C. Joyner v. Missouri-American Water Company*, Case No. WC-2006-0345, 2006 WL 3610803 (Mo. P.S.C.).

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Conclusions of Law as to Burden of Proof

Section 393.150.2 provides in part, "At any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the . . . water corporation . . . and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible." Consequently, MAWC carries the burden of proof to show its requested rate increase is just and reasonable.

Conclusions of Law Regarding the Presumption of Prudence

While a utility has the burden of proof, there is initially a presumption that its expenditures are prudent. The Commission has previously cited the following description of this process as found to apply to the Federal Energy Regulatory Commission:

The Federal Power Act imposes on the Company the "burden of proof to show that the increased rate or charge is just and reasonable." Edison relies on Supreme Court precedent for the proposition that a utility's cost are [sic] presumed to be prudently incurred. However, the presumption does not survive "a showing of inefficiency or improvidence." As the Commission has explained, "utilities seeking a rate increase are not required to demonstrate in their cases-in-chief that all expenditures were prudent . . . However, where some other participant in the proceeding creates a serious doubt as to the prudence of an expenditure, then the applicant has the burden of dispelling these doubts and proving the questioned expenditure to have been prudent."⁶¹

The Commission has interpreted this process as follows:

"In the context of a rate case, the parties challenging the conduct, decision, transaction, or expenditures of a utility have the initial burden of showing inefficiency or improvidence, thereby defeating the presumption of

⁶¹ *In the Matter of Union Electric Company*, 27 Mo.P.S.C. (N.S.) 183, 193 (1985) (quoting *Anaheim, Riverside, etc. v. Federal Energy Regulatory Commission*, 669 F.2d 779, (D.C. Cir. 1981)).

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prudence accorded the utility. The utility then has the burden of showing that the challenged items were indeed prudent. Prudence is measured by the standard of reasonable care requiring due diligence, based on the circumstances that existed at the time the challenged item occurred, including what the utility's management knew or should have known. In making this analysis, the Commission is mindful that "[t]he company has a lawful right to manage its own affairs and conduct its business in any way it may choose, provided that in so doing it does not injuriously affect the public."⁶²

Findings of Fact Regarding MAWC's Operations

19. MAWC is a wholly-owned subsidiary of American Water, the largest water service provider in North America. Headquartered in Voorhees, New Jersey, American Water serves 18 million people in 29 states and in Canada.⁶³

20. Prior to the Commission approved merger in 2001, MAWC consisted of three separate entities: (1) MAWC, which included Brunswick, Joplin, Mexico, Parkville Water and Sewer (Platte County), St. Charles, St. Joseph, and Warrensburg Districts; (2) St. Louis County Water Company; and (3) Jefferson City Water Works Company.⁶⁴

21. MAWC is currently the largest regulated water utility in the state of Missouri, providing water and wastewater services to approximately 1.3 million people in more than 100 communities across the state.⁶⁵

22. American Water, MAWC's parent company, initiated a reorganization in late 2003 that was completed at the end of 2004. As a result, the Central Region of America Water was formed, which includes Missouri American, Illinois American, Iowa American, Indiana American,

⁶² *State ex rel. City of St. Joseph v. Public Service Commission*, 30 S.W.2d 8, 14 (Mo. banc 1930). "In the Matter of Missouri-American Water Company's Tariff Sheets, Report and Order, Case No. WR-2000-281 (August 31, 2000).

⁶³ Exh. MAWC-6, Grubb Direct, Appendix A, News Releases pp. 70-91; Hearing Exh. Staff-17, Murray Direct, p. 11.

⁶⁴ Exh. MAWC-13, Jenkins Direct, p. 5. See also Case No. WM-2001-309.

⁶⁵ Exh. MAWC-1, p. 16, lines 13-18; Exh. MAWC-6, Appendix A, pp. 82-83; Exh. Staff-17, p. 11.

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Ohio American and Michigan American. The reorganization reduced direct costs at the operating level by eliminating management positions.⁶⁶

23. MAWC is not a rated entity and consequently has no credit rating.⁶⁷

24. American Water Capital Corporation (AWCC), a wholly-owned subsidiary of

American Water serves as the primary funding vehicle for American Water and its subsidiaries, is rated by Standard & Poor's (S&P). Although American Water does not directly provide MAWC debt financing (although it does provide them equity financing), it is also rated by S&P.⁶⁸

25. Currently, Standard & Poor's Corporation assigns a long-term corporate credit rating of A- with a negative CreditWatch for both AWCC and American Water.⁶⁹

26. On April 6, 2004, the Commission addressed MAWC's base rates in Case No.

WR-2003-0500. The order issued in that case approved a decrease of \$350,000 for MAWC's Joplin District and all other District's total revenues remained unchanged.⁷⁰

27. MAWC has made the following total capital investment expenditures since its last rate case:⁷¹

Location	2003	2004	2005	YTD thru June 2006
Brunswick	172, 485	91,072	178,454	176,454

⁶⁶ Exh. MAWC-6, p. 12, lines 12-24. Edward J. Grubb is the Rates and Regulation Manager for the Central Region of American Water and the Assistant Treasurer for MAWC. He holds a Bachelor of Science Degree in Business Administration from Drexel University and a Masters of business Administration from the University Of West Virginia College Of Graduate Studies. He is certified as a Certified Management Accountant and is certified in Financial Management by the Institute of management Accountants.

⁶⁷ Exh. Staff-17, p. 11.

⁶⁸ S & P started providing a direct credit rating for American Water on October 13, 2006. However, it should be noted that AWCC's credit rating has always been based on the consolidated creditworthiness of American Water. AWCC has been rated by S&P since June 19, 2000. Therefore, if American Water had been rated directly in the past along with AWCC, their credit ratings would most likely have been the same since the debt issued by AWCC is rated based on American Water's consolidated creditworthiness. Exh. Staff-17, p. 12.

⁶⁹ This rating currently reflects the stand-alone credit quality of American Water. In the past, American Water was rated one notch higher (A) because of its relationship with its parent company, RWE AG. Exh. Staff-17, p. 12.

⁷⁰ Exh. MAWC-13, p. 5. See also *In the Matter of Missouri-American Water Company's Tariff to Revise Water and Sewer Rate Schedules*, Case No. WR-2003-0500, Order Approving Stipulations and Agreements, effective April 16, 2004.

⁷¹ Exh. MAWC-4, DeBoy Direct, p. 2 (table).

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Cedar Hill	-	-	428,144	482,890
Jefferson City	797,217	982,040	1,201,483	229,367
Joplin	7,207,214	4,576,821	3,387,106	2,169,669
Mexico	523,599	528,444	620,598	496,281
Platte County	2,164,090	1,462,385	1,669,756	1,059,546
St. Charles	5,894,916	3,387,752	3,428,015	1,618,433
St. Joseph	3,995,133	1,326,938	2,127,930	710,387
St. Louis County	36,503,573	31,240,247	29,631,089	20,856,031
Warrensburg	729,214	513,071	769,366	424,066
Warren County Water	-	(2,975)	935,862	25,583
Warren County Sewer	-	68,153	486,357	447,521
Corporate	23,714	3,129,726	2,385,849	1,257,435
Total	58,011,155	47,303,673	47,250,010	29,953,663

Findings of Fact Regarding MAWC's Proposed General Rate Increase

28. As filed, MAWC's proposed tariffs sought a general rate increase to produce an additional water revenue \$41,387,823 in gross annual water revenues, (excluding gross receipts and sales taxes), or a 24.8% increase over existing water revenues.⁷²

29. As filed, MAWC's proposed tariffs sought a general rate increase to produce an additional \$73,795 in gross annual sewer revenues (excluding gross receipts and sales taxes), or a 25.7% increase over existing revenues.⁷³

30. The Test Year chosen by the parties and approved for use by the Commission was for the year ending June 30, 2006, trued-up through May 31, 2007.⁷⁴

31. According to Staff's True-Up Accounting Schedules, MAWC's Income Statement for the Test Year ending June 30, 2006, updated though December 31, 2006 was as follows:⁷⁵

⁷² Exh. MAWC-13, p. 3-4, 6 (this accounting schedule was not true-uped through May 31, 2007). See proposed Tariffs, Appendix A to Hearing Exh., MAWC-6.

⁷³ *Id.*

⁷⁴ Recommendation Concerning Test year and Request for True-Up Audit and Hearing, filed by MAWC on December 22, 2006; Exh. MAWC-13, p. 3-4.

⁷⁵ Exh. Staff-29, True-Up Accounting Schedules – Accounting Schedule 9; Exh. Staff-1 Grissum Direct, pp. 6-7. While there is no explanation in Ms. Grissum's testimony as to why these values are not "trued-up" through May 31, 2007, in the True-Up Direct of David Murray, he testifies that he was unable to true up his capital structure and rate of return proposals in a

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MAWC – Updated Test Year Income & Expenses

Description	Test Year as Adjusted
1. Total Operating Revenues	\$167,696,636
2. Total Operation and Maintenance Expense	\$92,512,665
3. Depreciation Expense - Plant	\$21,064,278
4. Amortization Expense	\$167,316
5. Non-Income Taxes	\$13,609,006
6. Total Other Operating Expense	\$34,840,600
7. Total Operating Expenses	\$127,353,265
8. Net Income Before Taxes	\$40,343,371
9. Current Income Taxes	\$6,277,946
10. Deferred Income Tax Expense	\$2,045,617
11. ITC Amortization	(\$130,740)
12. Total Income Taxes	\$8,192,823
13. Net Operating Income	\$32,150,548

32. According to Staff's True-Up Accounting Schedules, MAWC's Rate Base for the Test Year ending June 30, 2006, updated though December 31, 2006 was as follows:⁷⁶

more complete and timely manner due to the timing of production of MAWC's financial statements. Exh. Staff-20, pp. 1-2. The timing of production of these statements is assumed to have affected Staff's remaining accounting schedule. See also Exh. MAWC-16, Petry Direct, Schedule CAS-1.

⁷⁶ Exh. Staff-29, True-Up Accounting Schedules—Accounting Schedule 2. Exh. Staff-8, Began Direct, pp. 3-4. See also Exh. MAWC-16, Schedule CAS-1. See also Footnote 75.

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MAWC – Test Year Rate Base

Description	Total
1. Plant in Service	\$1,183,966,765
2. LESS: Accumulated Depreciation Reserve	\$305,628,234
3. LESS: Accumulated Amortization Reserve	\$0
4. SUBTOTAL: Net Plant in Service	\$878,338,531
5. ADD: Cash Working Capital	\$3,618,603
6. ADD: Materials & Supplies	\$3,373,350
7. ADD: Prepayments	\$687,420
8. ADD: Deferred OPEB Asset	\$936,348
9. SUBTOTAL: Total Additions to Net Plant in Service	\$8,615,721
10. DEDUCT: Interest Offset	2,868,561
11. DEDUCT: Federal Income Tax Offset	(481,769)
12. DEDUCT: State Income Tax Offset	29,544
13. DEDUCT: Contributions in Aid of Construction	\$140,200,267
14. DEDUCT: Customer Advances	\$60,478,163
15. DEDUCT: Customer Deposits	0
14. DEDUCT: Pre-71 ITC	\$31,282
15. DEDUCT: Deferred Income Taxes	\$68,656,976

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Description	Total
16. DEDUCT: Accrued Pension Liability	\$10,230,361
17. SUBTOTAL: Total Deductions from Net Plant in Service	\$282,013,385
18. TOTAL: Original Cost Rate Base	\$604,940,866

Conclusions of Law as to Rate Making Standards and Practices

The Commission is vested with the state's police power to set "just and reasonable" rates for public utility services,⁷⁷ subject to judicial review of the question of reasonableness.⁷⁸ A "just and reasonable" rate is one that is fair to both the utility and its customers;⁷⁹ it is no more than is sufficient to "keep public utility plants in proper repair for effective public service, [and] . . . to insure to the investors a reasonable return upon funds invested."⁸⁰ In 1925, the Missouri Supreme Court stated:⁸¹

The enactment of the Public Service Act marked a new era in the history of public utilities. Its purpose is to require the general public not only to pay rates which will keep public utility plants in proper repair for effective public service, but further to insure to the investors a reasonable return upon funds invested. The police power of the state demands as much. We can never have efficient service, unless there is a reasonable guaranty of fair returns for capital invested. *

* * These instrumentalities are a part of the very life blood

⁷⁷ Section 393.130, in pertinent part, requires a utility's charges to be "just and reasonable" and not in excess of charges allowed by law or by order of the commission. Section 393.140 authorizes the Commission to determine "just and reasonable" rates.

⁷⁸ St. ex rel. City of Harrisonville v. Pub. Serv. Comm'n of Missouri, 291 Mo. 432, 236 S.W. 852 (1922); City of Fulton v. Pub. Serv. Comm'n, 275 Mo. 67, 204 S.W. 386 (1918), error dis'd, 251 U.S. 546, 40 S.Ct. 342, 64 L.Ed. 408; City of St. Louis v. Pub. Serv. Comm'n of Missouri, 276 Mo. 509, 207 S.W. 799 (1919); Kansas City v. Pub. Serv. Comm'n of Missouri, 276 Mo. 539, 210 S.W. 381 (1919), error dis'd, 250 U.S. 652, 40 S.Ct. 54, 63 L.Ed. 1190; Lightfoot v. City of Springfield, 361 Mo. 659, 236 S.W.2d 348 (1951).

⁷⁹ St. ex rel. Valley Sewage Co. v. Pub. Serv. Comm'n, 515 S.W.2d 845 (Mo. App. 1974).

⁸⁰ St. ex rel. Washington University et al. v. Pub. Serv. Comm'n, 308 Mo. 328, 344-45, 272 S.W. 971, 973 (Mo. banc 1925).

⁸¹ Id.

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of the state, and of its people, and a fair administration of the act is mandatory. When we say "fair," we mean fair to the public, and fair to the investors.

The Commission's guiding purpose in setting rates is to protect the consumer against the natural monopoly of the public utility, generally the sole provider of a public necessity.⁸² "[T]he dominant thought and purpose of the policy is the protection of the public . . . [and] the protection given the utility is merely incidental."⁸³ However, the Commission must also afford the utility an opportunity to recover a reasonable return on the assets it has devoted to the public service.⁸⁴ "There can be no argument but that the Company and its stockholders have a constitutional right to a fair and reasonable return upon their investment."⁸⁵

The Commission has exclusive jurisdiction to establish public utility rates,⁸⁶ and the rates it sets have the force and effect of law.⁸⁷ A public utility has no right to fix its own rates and cannot charge or collect rates that have not been approved by the Commission;⁸⁸ neither can a public utility change its rates without first seeking authority from the Commission.⁸⁹ A public utility may submit rate schedules or "tariffs," and thereby suggest to the Commission rates and classifications which it believes are just and reasonable, but the final decision is the Commission's.⁹⁰ Thus, "[r]atemaking is a balancing process."⁹¹

Ratemaking involves two successive processes:⁹² first, the determination of the "revenue requirement," that is, the amount of revenue the utility must receive to pay the costs of producing the utility service while

⁸² *May Dep't Stores Co. v. Union Elec. Light & Power Co.*, 341 Mo. 299, 107 S.W.2d 41, 48 (1937).

⁸³ *St. ex rel. Crown Coach Co. v. Pub. Serv. Comm'n*, 179 S.W.2d 123, 126 (1944).

⁸⁴ *St. ex rel. Utility Consumers Council, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. banc 1979).

⁸⁵ *St. ex rel. Missouri Public Service Co. v. Fraas*, 627 S.W.2d 882, 886 (Mo. App. 1981).

⁸⁶ *May Dep't Stores*, *supra*, 107 S.W.2d at 57.

⁸⁷ *Utility Consumers Council*, *supra*, 585 S.W.2d at 49.

⁸⁸ *Id.*

⁸⁹ *Deaconess Manor Ass'n v. Pub. Serv. Comm'n*, 994 S.W.2d 602, 610 (Mo. App. 1999).

⁹⁰ *May Dep't Stores*, *supra*, 107 S.W.2d at 50.

⁹¹ *St. ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 765 S.W.2d 618, 622 (Mo. App. 1988).

⁹² It is worth noting here that Missouri recognizes two distinct ratemaking methods: the "file-and-suspend" method and the complaint method. The former is initiated when a utility files a tariff implementing a general rate increase and the second by the filing of a complaint alleging that the subject utility's rates are not just and reasonable. See *Utility Consumers Council*, *supra*, 585 S.W.2d at 48-49; *St. ex rel. Jackson County v. Pub. Serv. Comm'n*, 532 S.W.2d 20, 28-29 (Mo. banc 1975), *cert. denied*, 429 U.S. 822, 50 L.Ed.2d 84, 97 S.Ct. 73 (1976).

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yielding a reasonable rate of return to the investors.⁹³ The second process is rate design, that is, the construction of tariffs that will collect the necessary revenue requirement from the ratepayers. Revenue requirement is usually established based upon a historical test year which focuses on four factors: (1) the rate of return the utility has an opportunity to earn; (2) the rate base upon which a return may be earned; (3) the depreciation costs of plant and equipment; and (4) allowable operating expenses.⁹⁴ The calculation of revenue requirement from these four factors is expressed in the following formula:

$$RR = C + (V - D) R$$

where: RR = Revenue Requirement;
C = Prudent Operating Costs, including Depreciation Expense and Taxes;
V = Gross Value of Utility Plant in Service;
D = Accumulated Depreciation; and
R = Overall Rate of Return or Weighted Cost of Capital.

The return on the rate base is calculated by applying a rate of return, that is, the weighted cost of capital, to the original cost of the assets dedicated to public service less accumulated depreciation.⁹⁵ The Public Service Commission Act vests the Commission with the necessary authority to perform these functions. Section 393.140(4) authorizes the Commission to prescribe uniform methods of accounting for utilities and Section 393.140(8) authorizes the Commission to examine a utility's books and records and, after hearing, to determine the accounting treatment of any particular transaction. In this way, the Commission can determine the utility's prudent operating costs. Section 393.230 authorizes the Commission to value the property of water and sewer corporations operating in Missouri, that is, to determine the rate base. Section 393.240 authorizes the Commission to set depreciation rates and to adjust a utility's depreciation reserve from time-to-time as may be necessary.

⁹³ St. ex rel. Capital City Water Co. v. Missouri Pub. Serv. Comm'n, 850 S.W.2d 903, 916 n. 1 (Mo. App. 1993).

⁹⁴ Id., citing Colton, "Excess Capacity: Who Gets the Charge From the Power Plant?," 34 Hastings L.J. 1133, 1134 & 1149-50 (1983).

⁹⁵ See St. ex rel. Union Elec. Co. v. Pub. Serv. Comm'n, supra.

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The equation set out above shows that the Revenue Requirement is the sum of two components: first, the utility's prudent operating expenses, and second, an amount calculated by multiplying the value of the utility's depreciated assets by a Rate of Return. For any utility, its fair rate of return is simply its composite cost of capital.⁹⁶ The composite cost of capital is the sum of the weighted cost of each component of the utility's capital structure. The weighted cost of each capital component is calculated by multiplying its cost by a percentage expressing its proportion in the capital structure. Where possible, the cost used is the "embedded" or historical cost; however, in the case of Common Equity, the cost used is its estimated cost.

Estimating the cost of common equity capital is a difficult task, as academic commentators have recognized.⁹⁷ The United States Supreme Court, in two frequently-cited decisions, has established the constitutional parameters that must guide the Commission in its task.⁹⁸ In the earlier of these cases, *Bluefield Water Works*, the Court stated that:

Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the services are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.⁹⁹

In the same case, the Court provided the following guidance as to the return due to equity owners:

A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business

⁹⁶ Exh. Staff-17, p. 14, lines 19-26. "From a financial viewpoint, a company employs different forms of capital to support or fund the assets of the Company. Each different form of capital has a cost and these costs are weighted proportionately to fund each dollar invested in the assets. Assuming that the various forms of capital are within a reasonable balance and are valued correctly, the resulting total WACC, when applied to rate base, will provide the funds necessary to service the various forms of capital. Thus, the total WACC corresponds to a fair of return for the utility company. *Id.*

⁹⁷ Phillips, *The Regulation of Public Utilities*, supra, 394; Goodman, 1 *The Process of Ratemaking*, supra, 606.

⁹⁸ *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1943); *Bluefield Water Works & Improv. Co. v. Pub. Serv. Comm'n of West Virginia*, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1923).

⁹⁹ *Bluefield*, supra, 262 U.S. at 690, 43 S.Ct. at 678, 67 L.Ed. at 1181.

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undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.¹⁰⁰

The Court restated these principles in *Hope Natural Gas Company*, the later of the two cases:

'[R]egulation does not insure that the business shall produce net revenues.' But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.¹⁰¹

Two principal methods have emerged for determining the cost of Common Equity: these are the "market-determined" approach and the "comparable earnings" approach.¹⁰² The market-determined approach relies upon stock market transactions and estimates of investor expectations.¹⁰³ Examples of market-determined methods are the discounted cash flow ("DCF")¹⁰⁴ and

¹⁰⁰ *Id.*, 262 U.S. at 692-93, 43 S.Ct. at 679, 67 L.Ed. at 1182-1183.

¹⁰¹ *Hope Nat. Gas Co.*, *supra*, 320 U.S. at 603, 64 S.Ct. 288, 88 L.Ed. 345 (citations omitted).

¹⁰² Phillips, *supra*, 394.

¹⁰³ *Id.*

¹⁰⁴ "The DCF model was introduced by Myron J. Gordon for cost-of-common-equity determinations in 1962. This model, as used in utility ratemaking, is referred to as the dividend growth, Gordon growth and/or dividend discount model, in most college finance textbooks. The use of this model for stock valuation purposes had been introduced before this time." Hearing Exh. Staff-17, p. 7, lines 7-11.

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the capital asset pricing model ("CAPM").¹⁰⁵ The comparative earnings approach relies upon the concept of "opportunity cost," that is, the return the investment would have earned in the next best alternative use.¹⁰⁶ The comparative earnings approach requires a comparative study of earnings on common equity in enterprises of similar risk, regardless of whether the enterprises are regulated or unregulated.¹⁰⁷

An additional method that was used by MAWC witness, Pauline M. Ahern, which does not fall within the boundaries of either of the principal approaches referred to above, is the Risk Premium Method. This method is "relatively straightforward" and requires that the analyst "(1) determine the historic spread between the return on debt and the return on common equity, and (2) add this risk premium to the current debt yield to derive an approximation of current equity return requirements."¹⁰⁸ In the final analysis, it is not the method employed, but the result reached, that is important.¹⁰⁹ The Constitution "does not bind ratemaking bodies to the service of any single formula or combination of formulas."¹¹⁰

The annual form of the **DCF method** of calculating a fair return on common equity can be expressed algebraically by this equation:

$$k = D_1/P_S + g$$

where: k is the cost of equity;
 g is the constant annual growth rate of earnings, dividends and book value per share;
 D_1 is the expected next period annual dividend; and

¹⁰⁵ Phillips, *supra*, 394. "Much of the basis for this model was provided in 1964 by William F. Sharpe who received the Nobel Prize in 1990 for much of his work in producing this model." Hearing Exh., p. 7, lines 13-14.

¹⁰⁶ *Id.*, at 397.

¹⁰⁷ *Id.*, at 397-98.

¹⁰⁸ *Id.*, at 399.

¹⁰⁹ Within a wide range of discretion the Commission may select the methodology. Missouri Gas Energy v. Public Service Comm'n, 978 S.W.2d 434 (Mo. App. 1998), rehearing and/or transfer denied; State ex rel. Associated Natural Gas Co. v. Public Service Commission, 706 S.W.2d 870, 880, 882 (Mo. App. 1985); State ex rel. Missouri Public Service Co. v. Fraas, 627 S.W.2d 882, 888 (Mo. App. 1981). It may select a combination of methodologies. State ex rel. City of Lake Lotawana v. Public Service Comm'n of State, 732 S.W.2d 191, 194 (Mo. App. 1987).

¹¹⁰ *Fed. Power Comm'n v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 586, 62 S.Ct. 736, 743, 86 L.Ed. 1037, 1049-50 (1942).

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P_s is the current price of the stock.¹¹¹

Assuming that dividends grow at a constant annual rate, g , this equation can be solved for k , the cost of equity. The term D_1/P_s is called the dividend yield component of the annual DCF model, and the term g is called the growth component of the annual DCF model.¹¹² The annual DCF model is only a correct expression for the present discounted value of future dividends if the dividends are paid annually.¹¹³

The **CAPM** describes the relationship between a security's investment risk and its market rate of return.¹¹⁴ This relationship identifies the rate of return that investors expect a security to earn so that its market return is comparable with the market returns earned by other securities that have similar risk.¹¹⁵ The general form of the CAPM is as follows:

$$k = R_f + \beta (R_m - R_f)$$

where: k = the expected return on equity for a specific security;
 R_f = the risk-free rate;
 β = beta; and
 $R_m - R_f$ = the market risk premium.¹¹⁶

The **Comparative Earnings Approach ("CEM")** is derived from the corresponding risk" standard and is consistent with the *Hope* doctrine that the return to the equity investor should be commensurate with returns on investments in other firms having corresponding risks.¹¹⁷ CEM is based upon the concept of opportunity cost which maintains that the true cost of an investment is equal to the cost of the best available alternative use of the

¹¹¹ Exh. MAWC-1, pp. 25-38; Exh. Staff-17, Schedules D-1 and D-2; Exh MIEC-1, Gorman Direct, Appendix B pp. 9-10.

¹¹² Exh. Staff-17, Schedules D-1 and D-2.

¹¹³ In the Matter of the Tariff filing of The Empire District Electric Company to Implement a General Rate Increase for Retail Electric Service Provided to Customers in its Missouri Service Area, Case No. ER-2006-0315, 2006 WL 3848081 (Mo.P.S.C.), Slip Copy, p. 8 "The quarterly DCF model differs from the annual DCF model in that it expresses a company's price as the present discounted value of a quarterly stream of dividend payments. The quarterly DCF equation shows that the cost of equity is: the sum of the future expected dividend yield and the growth rate, where the dividend in the dividend yield is the equivalent future value of the four quarterly dividends at the end of the year, and the growth rate is the expected growth in dividends or earnings per share." Id.

¹¹⁴ Exh. Staff-17, Schedule E-1.

¹¹⁵ Id.

¹¹⁶ Exh. Staff-17, Schedule E-1; Exh. MIEC-1, Appendix B p. 22.

¹¹⁷ Exh. MAWC-1, p. 57, lines 10-23, p. 58, lines 1-23.

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funds to be invested.¹¹⁸ The CEM is designed to measure the returns expected to be earned on the book common equity, in this case net worth, of similar risk enterprises.¹¹⁹ The difficulty in application of the CEM is to select a proxy group of companies which are similar in risk, but are not price regulated utilities.¹²⁰

The “**Risk Premium Method**” is based on the principle that investors expect to earn a return on an equity investment in MAWC that reflects a “premium” over and above the return they expect to earn on an investment in a portfolio of bonds.¹²¹ This equity risk premium compensates equity investors for the additional risk they bear in making equity investments instead of bond investments.

Findings of Fact and Conclusions of Law Regarding Specific Issues

Conclusions of Law Regarding the Proper Treatment of the Global Non-Unanimous Stipulation and Agreement

Commission Rule 4 CSR 240-2.115(1)(B) states that the Commission “may resolve all or any part of a contested case on the basis of a stipulation and agreement.” A stipulation and agreement that is entered into by fewer than all parties to a case is deemed to be a nonunanimous

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See Report and Order issued December 21, 2006 *In the Matter of the Tariff Filing of The Empire District Electric Company to Implement a General Rate Increase for Retail Electric Service Provided to Customers in its Missouri Service Area*, Case No. ER-2006-0315, 2006 WL 3848081 (Mo.P.S.C.), *Slip Copy*, p. 8. The formula for the ex ante risk premium calculation has been expressed as follows:

$$RP_{\text{PROXY}} = DCF_{\text{PROXY}} - I_A$$

Where: RP_{PROXY} = the required risk premium on an equity investment in the proxy group of companies,

DCF_{PROXY} = average DCF cost of equity on a portfolio of proxy companies, and

I_A = the yield to maturity on an investment in A-rated utility bonds. *Id.*

In her Direct Testimony, Pauline Ahern characterized this method in the following way: “Risk Premium theory indicates that the cost of common equity capital is greater than the prospective company-specific cost rate for long-term debt capital. In other words, the cost of common equity equals the expected cost rate for long-term debt capital plus a risk premium to compensate common shareholders for the added risk of being unsecured and last-in-line for any claim on the corporation’s assets and earnings.” Exh. MAWC-1, p. 38, lines 15-20.

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stipulation and agreement.¹²² Each party is given seven days from the filing of a nonunanimous stipulation and agreement to file an objection to the nonunanimous stipulation and agreement, and failure to file a timely objection constitutes a full waiver of that party's right to a hearing.¹²³

"A nonunanimous stipulation and agreement to which a timely objection has been filed shall be considered to be merely a position of the signatory parties to the stipulated position, except that no party shall be bound by it."¹²⁴ In the instance of a non-unanimous stipulation and agreement that has been timely objected to, all issues shall remain for determination after hearing."¹²⁵ The Commission's Rules further state that a "party may indicate that it does not oppose all or part of a nonunanimous stipulation and agreement."¹²⁶

In this case, Joplin was the only party to object to the Global Agreement filed by the majority of the parties. Joplin clarified in its Revised List of Disputed Issues, its Amended List of Issues and in its Post-Hearing Brief that it objected to the Global Agreement only in part.¹²⁷

Because of Joplin's objection, and in accordance with its rules, the Commission will treat the Global Agreement as a "Joint Recommendation" of the signatories as to all of the issues resolved by the parties in the Global Agreement and those contested by Joplin. Because the Commission may, at its discretion, resolve all or any part of a contested case on the basis of a stipulation and agreement, it may also approve the parties' resolution of any or all of the issues in this case based upon the Global Agreement filed in this matter. It is irrelevant how the Commission characterizes the Global Agreement pursuant to its rules, because the rules allow the Commission to base its decision totally, or in part, upon the Global Agreement. Thus, should the Commission find that the items and terms of the Global Agreement are just and reasonable, the Commission may approve the Joint Recommendation of the parties, as embodied in the Global Agreement, in whole or in part.

Revenue Requirement and Rate Design

¹²² Commission Rule 4 CSR-240-2.115(2)(A).

¹²³ Commission Rule 4 CSR 240-2.115(2)(B).

¹²⁴ Commission Rule 4 CSR 240-2.115(2)(D).

¹²⁵ Id.

¹²⁶ Commission Rule 4 CSR 240-2.115(2)(E).

¹²⁷ See Joplin's Post-Hearing Brief, filed September 7, 2007, p. 3, Fn 1 ("All other issues addressed in the Non-Unanimous Stipulation and Agreement, except the two remaining issues, are unobjected to by Joplin and thus unopposed.").

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As an initial matter the Commission notes that all of the parties have either agreed to, or have not objected to, the annual revenue requirement identified in the Global Non-Unanimous Stipulation and Agreement filed on August 9. Consequently, no party contested, or requested a hearing on the determination of, any of the factors involved with the calculation of this revenue requirement, i.e. MAWC's prudent operating costs, including depreciation expense and taxes; MAWC's gross value of utility plant in service; MAWC's accumulated depreciation; and MAWC's overall rate of return or weighted cost of capital. The issues that Joplin disputes involve the allocation factors that are interrelated with how the total revenue requirement is distributed with District Specific rates.

Despite the fact that no party disputes the issues associated with the determination of MAWC's over-all revenue requirement, the Commission has a statutory duty to determine what constitutes just and reasonable rates for MAWC's customers and investors. Consequently, the Commission will address MAWC's revenue requirement and class allocations first. The Commission will next address Joplin's contested issues relating to District Specific allocators to complete its decision on rate design as it relates to the districts that MAWC serves. Finally, the Commission shall address Local 335's issues, and any other items contained in the Global Agreement that have not been contested by any party.

Findings of Fact Regarding Revenue Requirement

33. As noted in Findings of Fact Numbers 28 and 29 MAWC's tariffs sought a general rate increase to produce an additional \$41,387,823 in gross annual water revenues, and an additional \$73,795 in gross annual sewer revenues.

34. Based upon the analysis performed by MAWC's subject matter experts, MAWC requested an over-all rate of return on its rate base investment of 8.52%.¹²⁸

35. MAWC's proposed capital structure is as follows:¹²⁹

¹²⁸ Exh. MAWC-13, p. 4-8.

¹²⁹ Exh. MAWC-1, p. 3 and Schedule PMA-1; Exh. MAWC-13, pp. 8-11; and Schedule JMJ-1. Staff's witness David Murray argued that this was inappropriate because: "MAWC no longer issues all of its own debt. This change occurred when American Water created its financing subsidiary American Water Capital Corporation (AWCC). Although there are internal loan documents between MAWC and AWCC, AWCC is the entity that is actually issuing the debt on a consolidated basis for all of the subsidiaries of American Water. Additionally, AWCC is acting

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Class of Capital	Amount	Percent to Total	Cost Rate	Weighted Cost of Capital
Long-Term Debt	\$331,235,000	52.67%	6.04%	3.18%
Preferred Stock	\$2,644,000	0.42%	9.16%	0.04%
Common Equity	\$295,030,381	46.91%	11.30%	5.30%
Total Capitalization	\$628,909,381	100.00%		8.52%

36. MAWC calculated its requested rate on return by adding the component costs of its capital structure, weighted by their respective proportions to total capitalization.¹³⁰

37. MAWC recommended a common equity cost range of 11.025% to 11.575% based upon the use of four cost of common equity models; the Discounted Cash Flow approach ("DCF"), the Risk Premium Model ("RPM"), the Capital Assets Pricing Model ("CAPM") and the Comparable Earnings Model ("CEM").¹³¹

38. MAWC applied the results of the four cost of common equity models to proxy groups of six AUS Utility Reports water companies and four Value Line (Standard Edition.) water companies to conclude that a range of common equity cost rate should be 10.95% to 11.50% prior to quantifying a business risk adjustment.¹³²

39. MAWC made a business risk adjustment of 0.075% (7.5 basis points) to the range of indicated common equity cost rate of 10.95% to 11.50% to result in a recommended range of business risk adjust common equity cost rate of 11.025% to 11.575% with a midpoint of 11.30%.¹³³

as the corporate treasury for American Water, in that it also aggregates all of the cash receipts and disbursement functions for its subsidiaries." Exhibit Staff-18, Murray Rebuttal, pp. 5-6.

¹³⁰ Exh. MAWC-13, p. 8, lines 1-10.

¹³¹ Exh. MAWC-1. Pauline M Ahern provided this testimony and she is a Principal of AUS Consultants. She holds a BA Degree in Economics and a Masters Degree in Business Administration. She has prepared and offered subject matter expert testimony before twenty-two state regulatory commissions. *Id.* at p. 1.

¹³² Exh. MAWC-1.

¹³³ *Id.*

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40. MIEC's subject matter expert, Michael Gorman, offered a recommendation as to overall rate of return and return on common equity based upon the application of the DCF Model, RPM and CAPM.¹³⁴

41. MIEC did not recommend any adjustments to MAWC's proposed capital structure.¹³⁵

42. MIEC's summary of their analyses is presented in the following table.¹³⁶

Return on Equity Summary Results	
Description	Result
Constant Growth DCF	9.9%
Two-Stage DCF	8.5%
DCF Average	9.2%
Risk Premium	9.9%
CAPM	10.3%

43. Based on the above results, MIEC's recommended an estimated return of equity range for MAWC of 9.2% to 10.1%, with an average of 9.7%.¹³⁷

44. Based upon the return on equity of 9.7%, MIEC proposed a capital structure and rate of return as follows.¹³⁸

Class of Capital	Amount	Percent to Total	Cost Rate	Weighted Cost of Capital
Long-Term Debt	\$331,235,000	52.67%	6.04%	3.18%

¹³⁴ Exh. MIEC-1, p. 2, lines 9-23. Michael Gorman is an energy advisor and consultant and managing principal in the firm of Brubaker & Associates, Inc. He holds a BS Degree in Electrical Engineering and a Masters in Business Administration. He has provided subject matter expert testimony before regulatory commissions in 22 states and in Canada. *Id.* at p. 1 and Appendix A.

¹³⁵ Exh. MIEC-1, Appendix B, p. 5.

¹³⁶ *Id.*, Appendix B, p. 25.

¹³⁷ *Id.*

¹³⁸ Exh. MIEC-1, Appendix B-1.

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Preferred Stock	\$2,644,000	0.42%	9.16%	0.04%
Common Equity	\$295,030,381	46.91%	9.70%	4.55%
Total Capitalization	\$628,909,381	100.00%		7.77%

45. Ultimately, MIEC's expert recommended an average overall rate of return of 7.77% and a return on common equity of 9.7% for MAWC.¹³⁹

46. MIEC asserts their recommendation demonstrates a return on equity and overall rate of return for MAWC that provides adequate earnings and cash flow coverage to support an "A" bond rating from Standard & Poor's (S&P), which reflects American Water Capital Corp.'s current bond rating.¹⁴⁰

47. Staff's breakdown of capital structure was based upon the capital structure for American Water as of June 30, 2006 and is presented in the following table:¹⁴¹

Capital Component	Amount in Dollars	Percentage of Capital
Common Equity Stock	\$2,613,695,000	28.18%
Preferred Stock	\$1,779,324,374	19.18%
Long-Term Debt	\$4,300,271,634	46.36%
Short-Term Debt	\$583,010,000	6.28%
Total Capitalization	\$9,276,302,008	100.00%

48. Staff based its proposed capital structure on MAWC's parent company because MAWC does not have a stand-alone credit rating, has centralized most of its financing functions through its affiliate AWCC, can receive equity infusions thorough debt raised at American Water and the debt provided by AWCC is supported by American Water's creditworthiness.¹⁴²

¹³⁹ Exh. Staff-18, p. 5; Exh. MIEC-1, Appendix B, p. 1-29.

¹⁴⁰ Exh. MIEC-1, p. 2.

¹⁴¹ Exh. Staff-17, pp. 4-5 and Schedule 8. David Murray serves the Commission as a Utility Regulatory Auditor IV. He holds a BS Degree in Business Administration with an emphasis on Finance and Banking and a Masters in Business Administration. He has provided testimony before the Commission in numerous cases.

¹⁴² Exh. Staff-18, p. 2.

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49. Staff proposed weighted cost of capital through the date of May 31, 2007 for MAWC as follows:¹⁴³

Capital Component	Percentage of Capital	Embedded Cost	Weighted Cost of Capital Using Common Equity Return of:		
			8.60%	9.10%	9.60%
Common Equity Stock	45.80%	-----	3.94%	4.17%	4.40%
Preferred Stock	18.15%	5.90%	1.07%	1.07%	1.07%
Long-Term Debt	36.05%	5.72%	2.06%	2.06%	2.06%
Short-Term Debt	0.00%	5.39%	0.00%	0.00%	0.00%
	100.00%		7.07%	7.30%	7.53%

50. Staff's proposed Rate of Return for MAWC, once trued-up through May 31, 2007 ranged as follows 7.07 (Equity Return of 8.60), 7.30% (Equity Return 9.10% and 7.53% (Equity Return of 9.60%).¹⁴⁴

51. Staff based its recommendation on the common equity cost upon the use of the DCF Model and CAPM.¹⁴⁵

52. The parties' subject matter experts collectively established a range for MAWC's rate of return of 7.07% to 8.52%.

53. The parties' subject matter experts collectively established a range for MAWC's return on equity of 8.60% to 11.30%.

54. Staff's calculations resulted in a total gross annual revenue requirement for MAWC ranging from \$184,931,715 to \$189,448,297.¹⁴⁶

55. Staff's calculations resulted in a proposal to establish an additional increase in MAWC's base rates ranging between \$17,235,079 and \$21,751,661.¹⁴⁷

¹⁴³ Exh. Staff-17, Schedule 20. Staff's initial proposed weighted cost of capital, i.e. rate of return, calculated through June 30, 2006, ranged from 6.27% (8.60% Return on equity) to 6.55% (9.60% Return on Equity). Exh. Staff-17, p. 3 and Schedule 20.

¹⁴⁴ Exh. Staff-20, Murray True-Up Direct, pp. 1-5, Schedules 1-4; Exh. Staff-29, True-Up Accounting Schedules, Accounting Schedule 1.

¹⁴⁵ Exh. Staff-17, pp. 3-34 and accompanying Schedules. See also Footnote 141, *supra*.

¹⁴⁶ Exh. Staff-29, True-Up Accounting Schedules, Accounting Schedule 1.

¹⁴⁷ *Id.*

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56. Utilizing Staff's Adjusted Revenue at Current Rates, trued-up through May 31, 2007, and adding MAWC's requested revenue increase for both water and sewer service (\$41,387,823 and \$73,785, respectively) establishes that MAWC sought to establish a total gross annual revenue requirement of approximately \$209,159,254.¹⁴⁸

57. The signatory parties to the Global Agreement sought to establish a gross total annual revenue requirement of \$195,617,595, requiring an increase in MAWC's base rates by approximately \$29,000,000.¹⁴⁹

58. The signatory parties to the Global Agreement further limited the net increase in revenue to \$28,700,000 after imputation of \$300,000 of revenue to St. Joseph to reflect a rate block adjustment.¹⁵⁰

59. The revenue amounts embodied in the Global Agreement are exclusive of any applicable license, occupation, franchise, gross receipts taxes or other similar taxes.¹⁵¹

60. The signatory parties to the Global Agreement further agreed that the current Infrastructure System Replacement Surcharge ("ISRS") in the St. Louis District would be reset to zero and the property tax surcharge in the St. Joseph District would be terminated for service rendered on and after the effective date of rates in this case.¹⁵²

61. The signatory parties to the Global Agreement did not specifically agree to a rate base, rate of return or return on equity, but rather recommended approval of a \$28,700,000 increase in base rates based upon negotiation, compromise and assessment of the risks of litigation.¹⁵³

62. After adjusting for a chemical expense error that was discovered during the course of the hearing, the Global Agreement proposes a total increase in revenues of \$28,463,584 (*i.e.*, \$28,700,000

¹⁴⁸ Exh. Staff-29, True-Up Accounting Schedules, Accounting Schedule 1; Finding of Fact Number 33.

¹⁴⁹ The Non-Unanimous Stipulation and Agreement noted that the net increase would be \$28,700,000, after imputation of \$300,000 of revenue to the St. Joseph District. The total revenue requirement of \$195,617,595 includes the reduction of \$300,000 of the St. Joseph district's imputation of revenues.

¹⁵⁰ See *Non-Unanimous Stipulation and Agreement*, filed August 9, 2007, p. 2, paragraph 3.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See *Non-Unanimous Stipulation and Agreement*, filed August 9, 2007 and Staff's Response to the Commission's Order Directing Filing of September 10, 2007, filed on September 17, 2007.

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less \$236,416) for a total annual revenue requirement of \$195,381,179 (\$195,617,595 less \$236,416).¹⁵⁴

63. In prior cases, the Commission has recognized a range of reasonableness for the return on equity as being 100 basis points, plus or minus, the national average.¹⁵⁵

64. In Surrebuttal Testimony of Staff's witness David Murray, Mr. Murray references a national expert, Dr. Felicia C. Marston, Ph.D. who estimates the current cost of common equity for utilities nationally to be anywhere from 9.15% to 10.10 percent.¹⁵⁶

65. Additionally, Mr. Murray provides testimony regarding the average authorized ROE for American Water's subsidiaries from 2004 through 2006. That average ROE was 10.00%, whether the rate case was settled or fully litigated.¹⁵⁷

66. Utilizing these averages, and the Commission's prior analyses to determine a zone or reasonableness, the Commission determines that a reasonable ROE for MAWC should fall between the range of 8.15% and 11.10% with an average midpoint of 9.64%.

67. No party has objected to the annual revenue requirement as set forth in the Global Agreement.¹⁵⁸

68. No party objected to any component of any calculations, negotiations or compromise resulting in the annual revenue requirement as set forth in the Agreement.

69. No party requested a hearing on any portion of the determination of the annual revenue requirement as set forth in the Agreement.

¹⁵⁴ Transcript p. 151; Footnote Number 12, *supra*, and associated text.

¹⁵⁵ *In re Union Elec. Co.*, 257 P.U.R.4th 259, 2007 WL 1597782, Mo.P.S.C., May 22, 2007, Case No. ER-2007-0002; *In re Aquila, Inc.*, 257 P.U.R.4th 424, 2007 WL 1663103, Mo.P.S.C., May 17, 2007, Case No. ER-2007-0004; *In re Aquila, Inc.*, 2007 WL 2284480, Mo.P.S.C., May 17, 2007, Case No. ER-2007-0004; *In re Kansas City Power & Light Co.*, 2007 WL 750149, Mo.P.S.C., Jan 18, 2007, Case No. ER-2006-0314; *In re Empire Dist. Elec. Co.*, 2006 WL 3848081, Mo.P.S.C., Dec 21, 2006, Case No. ER-2006-0315; *In re Kansas City Power & Light Co.*, 2006 WL 4041675, Mo.P.S.C., Dec 21, 2006, Case No. ER-2006-0314.

¹⁵⁶ Exh. Staff-19, Murray Surrebuttal, p. 20. Felicia C. Marston, Ph.D. is an Associate Professor of Commerce at the McIntire School of Commerce at the University of Virginia.

¹⁵⁷ Exh. Staff-19, p. 25, lines 1-5; Schedules 1- 3.

¹⁵⁸ See *Non-Unanimous Stipulation and Agreement*, filed August 9, 2007; Footnotes 8, 9, 10, 19, 20, 22, and 23, *supra*, and accompanying text. See also the Commission's discussion on the issues pages 14-17 of this Report and Order.

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70. All parties waived cross-examination of any witness with regard to the determination of the annual revenue requirement as set forth in the Agreement.

71. Joplin, the only party objecting to the Global Agreement, has expressly stated that the only contested issues in this matter involve certain aspects of rate design. Specifically, those issues concern the allocation factors used for certain expenses resulting in the District Specific revenue requirement for Joplin.¹⁵⁹

Conclusions of Law Regarding Revenue Requirement

MAWC has compromised on its requested revenue requirement by entering into the Global Agreement and recommending to the Commission that its authorized revenue requirement in this case be increased by \$28,463,584. This recommendation is joined by Staff, Public Counsel, AGP, MEG, Warrensburg, Water Districts, MIEC, MSD, Parkville, and the HBA. No party has contested this revenue requirement or demonstrated any inefficiency or improvidence on the part of MAWC.¹⁶⁰ Moreover, subject matter experts Edward J. Grubb, Donald J. Petry and Stephen Rackers attested to the reasonableness of the Global Agreement and all of its elements, including the revenue requirement.¹⁶¹

The Commission concludes that the total revenue requirement of \$195,381,179, increasing MAWC's base rates by \$28,463,584, is a just and reasonable revenue requirement for MAWC that is fair to both the utility and its customers. While the parties to the Global Agreement/Joint Recommendation have not articulated, or specifically agreed upon a rate base, rate of return or return on equity, it is clear that the annual revenue requirement agreed to by, or uncontested by, all of the parties could only be derived by use of a rate of return on a rate base that would fall squarely within the zone of reasonableness as determined by the Commission.

The Commission concludes that this revenue requirement is no more than is sufficient to keep MAWC's utility plants in proper repair for effective public service, and insure to MAWC's investors a reasonable return upon funds invested. The Commission shall approve the Joint

¹⁵⁹ *Id.*

¹⁶⁰ As noted earlier in this order, any parties challenging the conduct, decision, transaction, or expenditures of a utility have the initial burden of showing inefficiency or improvidence, thereby defeating the presumption of prudence accorded the utility. The utility then has the burden of showing that the challenged items were indeed prudent.

¹⁶¹ Transcript pp. 178-180 (Testimony of Edward J. Grubb); pp. 230-231 (Testimony of Donald J. Petry); pp. 319-320 (Testimony of Stephen Rackers).

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Recommendation as to MAWC's annual revenue requirement, in all respects, as encompassed in the Global Agreement.

Rate Design - Class Cost of Service Allocations

Findings of Fact Regarding Class Cost of Service Allocations

72. Rate design for MAWC is composed of two separate components, District Specific Pricing and Class Cost of Service.

73. District Specific Pricing ("DSP") sets different rates for each of MAWC's service areas, based upon the discrete cost of service in each district, as opposed to Single Tariff Pricing ("STP"), a rate design theory under which all customers of a system with multiple service areas, whether interconnected or not, pay the same rate, regardless of differences in the actual cost of providing the service to the various customers.¹⁶²

74. DSP was adopted as the rate design theory to be applied to MAWC in the company's rate case before the Commission in 2000.¹⁶³

75. Class Cost of Service involves allocating costs in proportion to each customer class's use of the commodity, facilities and services involved. Its purpose is to accurately allocate costs on a causal basis. Once costs are allocated to customer classes using this method, rates can be developed to recover the necessary revenue from each class.¹⁶⁴

76. Customer classes commonly used in class cost of service studies for water and sewer utilities are: Residential, Commercial, Industrial, Other Public Authority, Other Water Utilities and Private Fire Protection.¹⁶⁵

77. The subject matter experts providing testimony on Class Cost of Service in relation to rate design for MAWC in this case included: James Russo for the Staff of the Commission; Barbara A. Meisenheimer for OPC; Paul R. Herbert for MAWC; and Donald E. Johnstone for AGP.¹⁶⁶

¹⁶² *In the Matter of Missouri-American Water Company's Tariff Sheets Designed to Implement General Rate Increase for Water and Sewer Service Provided to Customers in the Missouri Service Area of the Company*, , Case No. WR-2000-281, Report and Order, p. 58, Issued August 31, 2000, effective dated of September 14, 2000.

¹⁶³ *Id.* at p. 58-61.

¹⁶⁴ *Id.* at 61.

¹⁶⁵ Exhs.: Staff-25, M. Russo Direct, p. 3; OPC-1, Meisenheimer Direct, p. 6; MAWC-11, Herbert Rebuttal, p. 15-16; AGP-1, Johnstone Direct, pp. 3-7. See also the schedules accompanying the identified testimony for the exact calculations advocated by the parties.

¹⁶⁶ Mr. Russo serves the Commission as a Rate and Tariff Examination Supervisor. He holds a BS Degree in Accounting. He has provided subject matter expert testimony in multiple cases before the Commission. Exh. Staff-25 p. 1-2, and Schedule 1. Ms. Meisenheimer is the Chief Utility Economist for OPC. She holds a BS Degree in Mathematics and has completed

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78. Mr. Russo, Mr. Herbert and Ms. Meisenheimer all utilized the "Base-Extra Capacity Method" whereby various cost components are allocated based upon data pertaining to operating costs, operating revenues, system capacity, customer usage and customer numbers. The results of these allocations demonstrate the relative cost level that should be recovered from each customer class, and rates are then designed to recover the costs allocated to each class.¹⁶⁷

79. In the base-extra capacity method, costs are generally separated into four primary classes of cost: costs related to the number of customers regardless of consumption (customer costs), cost related to the total quantity of water used (base costs), costs related to the various peak water usage such as peak day usage (extra capacity costs), and costs that are related to fire-protection water usage (fire protection costs).¹⁶⁸

80. Edward J. Grubb, another of MAWC's subject matter experts, testified that, based upon a review of the rate design data found in the American Water Works Association Manual of Water Supply Practices, he believed that MAWC's current customer classifications were appropriate based upon the company's current cost structures and rates.¹⁶⁹

81. Mr. Herbert for MAWC noted that Staff and OPC did not refine their class cost of service studies to reflect the use of small mains in several districts, differences in system-wide peak hour ratios, and the benefits resulting from retained contract customers.¹⁷⁰

82. Staff's Witness, Mr. Russo, testified that he believed that revenues should be collected differently on a going forward basis. In particular he noted what he termed significant shifts with the revenue requirements for the class of Private Fire Protection.¹⁷¹

comprehensive exams for a Ph.D. in Economics. She has provided subject matter expert testimony in multiple cases before the Commission. Exh. OPC-1, p.1. Mr. Herbert is the President of Valuation and the Rate Division of Gannett Fleming, Inc. He holds a BS Degree in Finance. He has provided subject matter expert testimony before eleven state regulatory commissions. Exh. MAWC-12, pp. 1-2. Mr. Johnstone is the President of Competitive Energy Dynamics. He holds a BS Degree in electrical Engineering and a Masters in Business Administration. He has provided subject matter expert testimony before thirteen state regulatory commissions. Exh. AGP-1, Schedule 1.

¹⁶⁷ Exh. Staff-25, p. 3- 4; OPC-1 p. 4-5; Exh. MAWC-11, pp. 4-8. See also the schedules accompanying the identified testimony for the exact calculations advocated by the parties.

¹⁶⁸ *Id.*

¹⁶⁹ Exh. MAWC-6, p. 17.

¹⁷⁰ Exh. MAWC-11, pp. 12-15. See also the schedules accompanying the identified testimony.

¹⁷¹ Exh. Staff-25, p. 5. See also the schedules accompanying the identified testimony.

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83. Mr. Russo further testified that Staff's rate design for MAWC's sewer operations was based upon the Water and Sewer Departments small company rate design methodology.¹⁷²

84. Barbara A. Meisenheimer for OPC performed a class cost of service study and based upon her results she stated: "It appears that district costs shifts and intra-district class shift that occurred following the late rate case have brought the classes closer to cost. While the Commission might decide it is appropriate to focus on aligning certain classes in certain district, I do not believe a comprehensive adjustment is necessary in this case. For example, my studies indicate that for most districts, the Residential Class is reasonably close to its cost of service."¹⁷³

85. Donald E. Johnstone for AGP advocated a "straight fixed-variable rate design, eliminating the use of customer class designations, i.e. residential, commercial, industrial, public authority and sales for resale."¹⁷⁴

86. Mr. Johnstone recommended "Volumetric Rates Based on Rate Rationalization" utilizing fixed rates per 1000 gallons usage with four volumetric block classifications.¹⁷⁵

87. The signatory parties to the Global Agreement reached a compromise with regard to allocating costs on a class basis for all of MAWC's Districts for the following classes: Residential (including Rate A for St. Louis), Commercial (including Rates A and K for St. Louis), Industrial, Private Fire Protection, Public Fire Protection, Other Public Authorities (including Rate A for St. Louis), and Sales for Resale.¹⁷⁶

88. The signatory parties to the Global Agreement reached agreement as to the Billing Determinants utilized for purpose of rate design.¹⁷⁷

89. No party has objected to the Class Cost of Service allocation factors or the Billing Determinants utilized for each District as set forth in the Global Agreement.¹⁷⁸

90. No party objected to any component of any calculations, negotiations or compromise resulting in determining the Class Cost of

¹⁷² Exh. Staff-25, p. 6. See also the schedules accompanying the identified testimony.

¹⁷³ Exh. OPC-1, p. 4. See also OPC-3, Meisenheimer Surrebuttal, p. 2. See also the schedules accompanying the identified testimony.

¹⁷⁴ Exh. AGP-1, pp. 3-7. See also the schedules accompanying the identified testimony.

¹⁷⁵ *Id.*

¹⁷⁶ See *Non-Unanimous Stipulation and Agreement* filed on August 9, 2007, pp. 2-3, paragraph 4 and Appendix A-1.

¹⁷⁷ *Id.*, pp. 2-3, paragraph 5 and Appendix B.

¹⁷⁸ See Footnote Number 158, *supra*.

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Service allocation factors or the Billing Determinants as set forth in the Global Agreement.

91. No party requested a hearing on any portion of the determination of the Class Cost of Service allocation factors or the Billing Determinants as set forth in the Global Agreement.

92. All parties waived cross-examination of any witness with regard to the determination of the Class Cost of Service allocation factors or the Billing Determinants as set forth in the Global Agreement.

93. Again, Joplin, the only party objecting to the Global Agreement, has expressly stated that the only contested issues in this matter involve allocation factors used for certain expenses resulting in the District Specific revenue requirement for Joplin, not any of the allocation factors or billing determinants that relate to the determination of Class Cost of Service.¹⁷⁹

Conclusions of Law Regarding Class Cost of Service Allocations

The Commission observes that the parties' experts, while primarily using the same methodology (AGP's witness being the exception) identified some variations with the manner in which they performed their Class Cost of Service analyses and with their ultimate recommendations regarding whether the customer classes were appropriately matched to their cost of service.¹⁸⁰ Despite these variations, the parties providing testimony on these matters reached a compromise in the Global Agreement as to the respective factors to quantify each Class Cost of Service.

No party opposed this portion of the rate design and from all appearances in Appendix A-1 of the Global Agreement, the parties agreed to maintain the status quo as evidenced by repeated references to the terminology of "equal percent class revenue increase/decrease." The parties' unanimous agreement to, or lack of opposition to, class cost of service allocation factors and billing determinants demonstrates to the Commission that this portion of rate design is just and reasonable. Moreover, subject matter experts Edward J. Grubb, Donald J. Petry and Stephen Rackers attested to the reasonableness of the Global Agreement and all of its elements, including rate design.¹⁸¹

¹⁷⁹ *Id.*

¹⁸⁰ See also Exh. MIEC-3, Gorman Rebuttal. See also the schedules accompanying the identified testimony.

¹⁸¹ Transcript pp. 178-180 (Testimony of Edward J. Grubb); pp. 230-231 (Testimony of Donald J. Petry); pp. 319-320 (Testimony of Stephen Rackers).

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The Commission notes that the parties to this action represented a wide range of government, commercial, industrial and public interest groups. The fact that this wide representation of competing interests resulted in unanimous agreement to, or lack of opposition to these factors, demonstrates that the agreed upon allocations factors and billing determinants achieve the Commission's statutory goals of ensuring that just and reasonable rates are set that are fair to the utility and its customers, and in this instance to each class of the utility's customers. The Commission shall approve the Joint Recommendation as to the class cost of service allocation factors and billing determinants, in all respects, as encompassed in the Global Agreement.

Joplin's Contested Issues – Rate Design – District Specific Pricing

As noted throughout this order, Joplin's contested issues involve certain allocation factors as they relate to the DSP component of rate design. Based upon the competent and substantial evidence on the record as a whole, the Commission makes the following findings of facts and conclusions of laws with regard to the issues raised by Joplin.

Issue 1: What is the proper basis for allocating MAWC's corporate expenses to the various districts, to include administrative and general expenses, customer accounts, depreciation, and other general taxes?

Findings of Fact Regarding Joplin's Issue 1

94. MAWC serves the following operating water and/or sewer districts: Brunswick, Cedar Hill, Jefferson City, Joplin, Mexico, Parkville, St. Charles, St. Joseph, St. Louis, Warren County, and Warrensburg.¹⁸²

95. When determining what portion of MAWC's revenue requirements will be allocated for each operating district, certain costs must be taken into account: (1) those that are directly attributable to each district (e.g., employees, office space, vehicles, etc.) and thus directly assigned to that district; and, (2) general corporate costs not directly attributable to a specific district(s), which therefore must be allocated to the districts.

96. Examples of these general corporate costs include management fees charged by the American Water ("Service Company") to the operating subsidiaries such as MAWC.¹⁸³

¹⁸² See Findings of Fact 1-4, 19-22, and 27, *supra*; Hearing Exh. Staff-29, Staff True-Up Accounting Schedules.

¹⁸³ Transcript p. 160-164 (Testimony of Edward J. Grubb). See also Exhs. MAWC-6, 7, 8, 9.

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97. Functions provided by the Service Company include financial services, accounts payable, human resources, purchasing, etc. These costs are consolidated at the Service Company level to achieve economies of scale. They are then allocated by the Service Company to the operating subsidiaries based on the number of customers served by the operating subsidiary as a percentage of total customers served by all operating subsidiaries.¹⁸⁴

98. In addition to Service Company costs, MAWC incurs its own administrative and general expenses, such as corporate employees' salaries, collection agency fees, customer billing expense, postage, rents, office supplies, and janitorial expenses. These administrative and general costs are recorded in a corporate business unit so they can be identified and controlled and are then allocated to the districts for recovery in a rate case.¹⁸⁵

99. Prior to entering the Global Agreement, MAWC proposed to allocate these general corporate costs to the various districts primarily based upon the number of customers served in each district as a percentage of total customers served statewide.¹⁸⁶

100. MAWC's witness Edward J. Grubb, testified that MAWC chose to use customers as its primary allocation factor for most of the general corporate costs because it believes that its focus is serving its customers, and it is the customers that drive the costs incurred by MAWC.¹⁸⁷

101. MAWC's witnesses Mr. Grubb and Donald Petry testified that exceptions to the general allocation factor of using customer number, as proposed by MAWC, include: (1) workers compensation expense, which MAWC proposed to allocate based on payroll; (2) transportation expense which MAWC proposed to allocate based on vehicles; and, (3) corporate depreciation expense which MAWC proposed to allocate based on plant-in-service.¹⁸⁸

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Transcript p. 155 (Testimony of Edward J. Grubb). See also Exhs. MAWC-6, 7, 8, 9.

¹⁸⁷ Transcript p. 178 (Testimony of Edward J. Grubb). See also Exhs. MAWC-6, 7, 8, 9. Edward J. Grubb is MAWC's Manager of Rates and Regulation. He holds a BS Degree in Business Administration with a major in Accounting and a Masters of business Administration. He has also completed Certification programs in management Accounting and Financial Management. He has prepared rate cases and presented subject matter expert testimony before eight regulatory commissions. Exh. MAWC-6 p. 1 and Schedule EJG-1.

¹⁸⁸ Transcript pp. 159-160 (Testimony of Edward J. Grubb), 216-220 (Testimony of Donald J. Petry). See also Exhs. MAWC-6, 7, 8, 9, 16, 17. Donald J. Petry is MAWC's Senior Financial

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102. The Staff proposed allocating general corporate costs based mainly on the total payroll expense directly attributable to each district as a percentage of the total payroll attributable to all districts. Of the approximately thirty different categories of administrative and general expense at the corporate level, Staff used payroll as its allocation factor on all but one expense.¹⁸⁹

103. Staff's witness Stephen Rackers asserts that payroll is the most appropriate allocation factor because the costs of corporate employees, as well as other costs incurred at the corporate level, are incurred to support the employees in the field and/or at the district level.¹⁹⁰

104. As testified to by witnesses for both Staff and MAWC, there is a correlation between payroll and customers. The amount of employees assigned to a particular district is a function of the number of customers that those employees are required to serve.¹⁹¹

105. Staff also proposed allocating corporate depreciation expense based on payroll which, according to Mr. Rackers, reflects the fact that the general corporate assets, such as vehicles, computers, etc., exist to support the employees or work force assigned to each of the districts.¹⁹²

106. Staff's use of payroll as an allocation factor is consistent with the way in which it has allocated costs in previous MAWC rate cases, and is consistent with the way in which Staff has traditionally allocated corporate type expenses in other utility rate cases.¹⁹³

107. Under MAWC's method of allocating costs, 5.03% of the total, per book corporate costs were allocated to the Joplin District. Under

Analyst. He holds a BS Degree in Accounting and Masters Degree in Business Administration. He has prepared subject matter expert testimony for the Public Utilities Commission of Ohio. Exh. MAWC-16, p. 1 and Schedule DJP-1.

¹⁸⁹ Transcript pp. 310-312 (Testimony of Stephen Rackers). See also Exhs. Staff-5, 6, 7, 28, 29, 30, 31 and 32.

¹⁹⁰ Transcript pp. 284-286, 290, 296, 307-311 and 329 (Testimony of Stephen Rackers). See also Exhs. Staff 5, 6, 7, 28, 29, 30, 31, and 32. Stephen Rackers serves the Commission in the position of Utility Regulatory Auditor V. He has a BS Degree in Business Administration with a major in Accounting and is a CPA. Stephen Rackers has provided subject matter expert testimony in 28 cases before the Commission. Exh. Staff-5, Schedule 1,

¹⁹¹ Transcript pp. 157, 181-182 (Testimony of Edward J. Grubb), 215 (Testimony of Donald J. Petry), 320-321 (Testimony of Steve Rackers). See also Exh. MAWC-6, 7, 8, 9, 16, 17, and Staff 5, 6, 7, 28, 29, 30, 31 and 32.

¹⁹² Transcript p. 302-303 (Testimony of Stephen Rackers). These same allocation methods are embodied in the Global Agreement to which Staff and MAWC are both signatories. See also Exhs. Staff-5, 6, 7, 28, 29, 30, 31 and 32.

¹⁹³ Transcript pp. 295 and 320-321 (Testimony of Stephen Rackers); See also *In Re: Union Electric*, 27 Mo. P.S.C. (N.S.) 183, 275 & 290, 66 PUR4th 202(1985). and Exhs. Staff 5, 6, 7, 28, 29, 30, 31 and 32.

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Staff's method of allocating costs, 5.11% of the total, per book corporate costs were allocated to the Joplin District.¹⁹⁴

108. Although Staff used different allocation factors than MAWC, the end result of Staff's allocation was very similar to that of MAWC and within the realm of reasonableness in the opinion of MAWC.¹⁹⁵

109. On the other hand, Joplin's initial proposal was to allocate all corporate costs solely based upon "length of mains" (*i.e.*, the linear feet of mains in a district as a percentage of the total linear feet of mains statewide).¹⁹⁶

110. In her prepared rebuttal testimony, Joplin's witness, Ms. Leslie Jones, unequivocally stated that the "**most appropriate factor**" is length of mains "because the amount of usage of corporate services is directly tied to the actual infrastructure on the ground in an [sic] utilities environment."¹⁹⁷

111. Ms. Jones further testified that "other allocation factors do not accurately reflect the needs and uses of corporate resources to the extent that infrastructure basis would."¹⁹⁸

112. Ms. Jones provided only three pages of pre-filed testimony in this matter addressing these factors, and filed no accounting schedules to corroborate her testimony when it was pre-filed.¹⁹⁹

113. Ms. Jones testified that she had no work papers of any kind to verify her prefiled rebuttal testimony and clarified, "Mostly what I was doing was working off of the schedules that I had and using my adding machine. I was not working in a spreadsheet."²⁰⁰

114. At hearing, Ms. Jones stated that she chose length of mains over any other factor because: "Basically, the infrastructure of the City of Joplin. It -- the City of Joplin has not had any -- any improvements for a long time as -- that's my understanding. And the length of mains, I felt,

¹⁹⁴ Transcript pp. 155-159, 181, 191-192 (Testimony of Edward J. Grubb). See also Exhs. MAWC-6, 7, 8, 9.

¹⁹⁵ Transcript pp. 155-157, 181, 189 (Testimony of Edward J. Grubb). See also Exhs. MAWC-6, 7, 8, 9.

¹⁹⁶ Transcript pp. 358-360 (Testimony of Leslie Jones). Exh. Joplin-1, pp. 1-3.

¹⁹⁷ Ex. Joplin-1, p. 2. Ms. Jones holds a BS Degree in Accounting and is a CPA and CMA. Transcript p. 390. Ms. Jones testified that this was the first utility rate case that she had personally been involved with. Transcript p. 407.

¹⁹⁸ Ex. Joplin-1, p. 2.

¹⁹⁹ Ex. Joplin-1.

²⁰⁰ Transcript p. 403 (Testimony of Leslie Jones).

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reflected the infrastructure in the City of Joplin, and, therefore, a - a good factor, allocation factor, for corporate expenses."²⁰¹

115. Ms. Jones provided essentially no documentary support for Joplin's pre-hearing position regarding using length of mains as the sole allocation factor, only providing 3 pages of accounting spreadsheets entitled "Revenue Requirement" after the hearing and after being ordered by the Commission to provide any and all materials relied upon by Joplin to support its position offered in the prefiled rebuttal testimony of Ms. Jones.²⁰²

116. The amount of mains located within a district; however, is not an appropriate indication of the amount of corporate costs attributable to that district.²⁰³ There is no correlation between the feet of pipe located within a district and the number of customers that the Company serves in that same district.²⁰⁴ Additionally, using length of mains as an allocation factor does not reflect the total plant investment in all districts.²⁰⁵

117. Using length of mains as the sole allocation factor, Joplin proposed to allocate .011% of general corporate costs to the Joplin District.²⁰⁶

118. Prior to Ms. Jones presenting her live testimony at hearing, Staff's Witness Stephen Rackers made a correction to the linear feet of mains calculation in the St. Louis County District.²⁰⁷

²⁰¹ Transcript p. 359. (Testimony of Leslie Jones)

²⁰² The Commission's order essentially compelled Joplin to respond to AGP's Data Request # 4, Hearing Exh. AGP-4, served on July 20, 2007, to which Joplin responded that it had no documents at that time, but would supplement the data request if the documents were generated. *Order Extending Deadline for Filing Suggestions Regarding Non-Unanimous Stipulation and Agreement, Setting Briefing Schedule, Order Proposed Findings of Fact and Conclusions of Law, Directing the filing of Late-Filed Exhibits and Responses, and Addressing Other Procedural Matters*, issued August 15, 2007; *Order Clarifying Post-hearing Procedural Schedule*, issued August 20, 2007; *Statement of Filing Documents Pursuant to Commission Order of August 15, 2007*, filed August 22, 2007. See also Footnote Numbers 16 through 18, *supra*.

²⁰³ Transcript p. 183 (Testimony of Edward Grubb). See also Exhs. MAWC-6, 7, 8, 9

²⁰⁴ Transcript 165-166, 182-184 (Testimony of Edward Grubb). See also Exhs. MAWC-6, 7, 8, 9.

²⁰⁵ Exh. Staff-7, Rackers Surrebuttal, p. 2.

²⁰⁶ Transcript p. 374, 407-408. Staff's Witness Stephen Rackers testified that the only position he was aware of Joplin advocating was the length of mains, but that Staff's correction to the length of main calculation would increase the percentage for that allocator from 0.011% to 7.105%. Transcript p. 332-333.

²⁰⁷ Transcript pp. 270-277 (Testimony of Stephen Rackers). See also Exhs. Staff 5, 6, 7, 28, 29, 30, 31, and 32.

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119. Staff's correction had the effect of changing the allocation of corporate costs to the Joplin District based on length of mains from .011% to 7.105%.²⁰⁸

120. Because Staff used the length of main allocation factor sparingly, this change had an immaterial effect on the Staff's case.²⁰⁹ Staff only uses this factor to allocate distribution expense, which is a relatively minor amount of expense – roughly \$6,000.²¹⁰

121. Using the corrected allocation factor for length of mains in Joplin's originally advocated position; however, would result in a higher allocation of costs to Joplin than Staff (and the Global Agreement) had proposed.²¹¹

122. Staff had informed Joplin of the correction to the length of main calculation on Wednesday, August 8, 2007, two days prior to Joplin filing its revised issues list, where it reiterated its position that linear feet of main was the appropriate allocation factor for corporate and general expenses, and six days prior to the resumption of the evidentiary hearing.²¹²

123. Ms. Jones acknowledged that she was aware of Staff's change in calculations for the length of main allocator on Thursday, August 9, 2007.²¹³

124. At hearing, after Mr. Rackers' testimony corrected the length of mains allocation factor, Ms. Jones sought to correct her testimony and changed her position as to the proper allocation factor(s) to be used for these expenses.²¹⁴

125. Although Joplin was denied the opportunity to correct its testimony because it went beyond the point of corrections and amounted to a complete change in position, Joplin was permitted to supplement its testimony on the basis of Staff's correction.²¹⁵

126. Joplin's new position, as testified to by Ms. Jones, was to: (1) allocate all of the expenses under customer accounts based on MAWC's customer allocation factor; (2) allocate all corporate benefits, workers

²⁰⁸ Transcript pp. 325, 333 (Testimony of Stephen Rackers), p. 408 (Testimony of Leslie Jones). See also Exhs. Staff 5, 6, 7, 28, 29, 30, 31, and 32.

²⁰⁹ Transcript pp. 270-272, 281 (Testimony of Stephen Rackers). See also Exhs. Staff 5, 6, 7, 28, 29, 30, 31 and 32.

²¹⁰ Transcript p. 281 (Testimony of Stephen Rackers). See also Exhs. Staff 5, 6, 7, 28, 29, 30, 31 and 32.

²¹¹ Transcript p. 324.

²¹² See Joplin's "List of disputed Issues," filed August 10, 2007; Transcript pp. 274-275.

²¹³ Transcript p. 370, 396 (Testimony of Leslie Jones).

²¹⁴ Transcript pp. 336-358 (Testimony of Leslie Jones).

²¹⁵ *Id.*

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compensation, OPEBs and pension expenses based on Staff's payroll allocation factor; (3) allocate other general taxes based on the MAWC's customer allocation factor; (4) allocate Belleville Labs based on Staff's "per test" allocation factor; and, (5) only corporate depreciation expense would be allocated using length of mains.²¹⁶

127. Ms. Jones testified that she was more comfortable using pipe length as an allocation factor when the pipe length percentage ascribed to Joplin was very small, i.e. .011%.²¹⁷

128. Ms. Jones testified that she could not answer the question regarding how Joplin's new positions would affect Joplin's portion of MAWC's revenue requirement.²¹⁸

129. Ms. Jones testified that her testimony was going to be "[a]s favorable to Joplin" as possible, "but also as reasonable and a direct correlation as possible."²¹⁹

130. Ms. Jones also testified that she intended to abandon her prefiled rebuttal testimony prior to 9:00 a.m. on August 14, 2007, (the date and time the hearing resumed from its postponement on August 6, 2007) prior to hearing the testimony of Mr. Rackers and his changes to the length of main allocator.²²⁰

131. Ms. Jones stated various reasons for wishing to change her testimony including: "I've had an opportunity to spend more time reviewing the EMS run." "I've listened to the testimony today." "With allocations, you try to find the best allocation that has the most direct correlation, the most direct relationship to that district so that you can arrive at a district specific cost." "I've had additional time to review the information that's been coming in literally daily, sometimes two and three times a day." "I've sat here listened to the testimony." "I don't think it's just the testimony that changed my mind." It's just looking at how to best properly allocate the administrative and general corporate expenses to every district."²²¹

132. When asked what information caused Ms. Jones to change her position Ms. Jones testified: "I -- I guess I would have to say I'm -- I don't think it's really additional information as much as reviewing the

²¹⁶ Transcript pp. 337-354 (Testimony of Leslie Jones). Staff calculated that Joplin's portion of MAWC's revenue requirement would be decreased by \$85,113 if Joplin's newly advocated cost allocation methods were utilized. See *Staff's Response to the Commission's Order Directing Filing of September 10, 2007*, filed September 17, 2007.

²¹⁷ Transcript p. 374 (Testimony of Leslie Jones).

²¹⁸ Transcript pp. 400-401, 415, 419 (Testimony of Leslie Jones).

²¹⁹ Transcript p. 409 (Testimony of Leslie Jones).

²²⁰ Transcript pp. 363-366 (Testimony of Leslie Jones).

²²¹ Transcript pp. 337, 354, 360, 361 (Testimony of Leslie Jones).

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information. And then as more information came in on payroll and the chemical today and -- and then the length of mains, it was just a culmination of all of it."²²²

133. When asked: "Is there anything that you heard today that changed how you were going to testify regarding allocation factors?" she responded: "Today? No."

134. When asked, "And can you identify any piece of information, any specific piece of information, that led to your changed testimony?" Ms. Jones replied, "No. Not one -- not any one piece. No."²²³

135. Ms. Jones went on to testify that she continued to work on her analysis right up to the start of the hearing on August 14, 2007 and that she had no opportunity to inform the other parties of her changes in position.²²⁴

136. Ms. Jones further testified that the change in Mr. Rackers' testimony had some effect on her own testimony stating: "Well, obviously, when you're going to present a 700 percent increase when it has -- when that number is going to affect Joplin, you know, I have to stop and re-evaluate the information."²²⁵

137. Ms. Jones also testified that she had not checked Staff's length of main calculations; had not performed a study on Joplin's water main infrastructure; was not familiar with the wells recently drilled in Joplin; had not generated any documents showing the calculation of the impact of her proposed allocator(s); and had not, to her knowledge, followed her normal practice to save any computer generated spreadsheets reflecting any such calculations.²²⁶

138. Ms. Jones further testified that she was not an expert in utility regulation and not an expert in utility infrastructure.²²⁷

139. When asked, "And what basis are you tendering testimony before the Commission as an expert on?", Ms. Jones replied "Well, I'm not sure I've ever said I'm an expert exactly. But, basically,

²²² Transcript p. 369 (Testimony of Leslie Jones). With regard to Ms. Jones's change in position, Counsel for Joplin stated: "I think it's -- based upon what I've heard today, it appears to be correcting testimony, based upon what the Staff's testimony was changing the factors." Transcript p. 338.

²²³ Transcript p. 371 (Testimony of Leslie Jones).

²²⁴ Transcript p. 371-373 (Testimony of Leslie Jones).

²²⁵ Transcript pp. 374-376 (Testimony of Leslie Jones).

²²⁶ Transcript pp. 374, 379, 383-386 (Testimony of Leslie Jones).

²²⁷ Transcript p 394 (Testimony of Leslie Jones).

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allocations.” Ms. Jones clarified that she tendered herself before the Commission as an expert in allocations.²²⁸

140. Ms. Jones also testified that she had not reviewed any previous rate cases for MAWC; had not reviewed any allocation factors previously approved by this Commission; was unaware of the Commission's approved systems of accounts, and was unaware of the National Association of Regulatory Utility Commissioners' (“NARUC”) water cost allocation manual.²²⁹

141. In essence, Joplin's new position was to adopt, for all but one of the corporate expense items, the same allocation factors proposed by the Company or Staff (i.e., customers or payroll).²³⁰

142. After acknowledging that all but one of her newly recommended allocation factors was in line with either Staff's position or MAWC's position, Ms. Jones testified that she could not offer an opinion as to whether she was in agreement with any of the compromises these parties had reached in the Global Agreement.²³¹

143. Ms. Jones further testified that while she felt Staff's allocation methods were “not the best” that she was unable to comment as to whether the application of Staff's methods produced an unreasonable result.²³²

144. Staff's placed a value of \$85,113 on Joplin's Corporate Allocation issue based upon District Specific Pricing.²³³

Issue 2: What is the proper basis for payroll tax payment as annualized for the Joplin District and certain depreciation issues?²³⁴

Findings of Fact Regarding Joplin's Issue 2

145. There are two aspects to the payroll and payroll tax. First, there is payroll and payroll tax directly attributable to those employees who work within a specific district. That payroll and payroll tax amount is directly assigned to that particular district. Then there is the payroll and payroll tax associated with employees working at the corporate office, which is

²²⁸ Transcript pp. 394-395 (Testimony of Leslie Jones). See Footnote Number 197, *supra*, for Ms. Jones's biographical information.

²²⁹ Transcript pp. 395, 406-407 (Testimony of Leslie Jones).

²³⁰ Transcript pp. 411-413 (Testimony of Leslie Jones).

²³¹ Transcript p. 415 (Testimony of Leslie Jones).

²³² Transcript p. 419 (Testimony of Leslie Jones).

²³³ Staff's Response to the Commission's Order Directing Filing of September 10, 2007, filed September 17, 2007.

²³⁴ Depreciation issues were addressed in the section covering Joplin's first issue.

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allocated to the various districts.²³⁵

146. MAWC's witness Donald J. Petry testified that MAWC annualizes payroll and associated payroll tax by determining the number of employees on its payroll at the end of the test period (*i.e.*, June 30, 2006). It adjusts this number for any vacancies or new hires that occurred through the end of the true-up period (*i.e.*, May 31, 2007), and calculates labor rates based on pay rates existing at the time of the true-up. Payroll taxes were based on the annualized payroll for each employee using the appropriate tax rates.²³⁶

147. Staff's witness Lisa Hanneken testified that Staff looks at all employees as of the end of the test year (*i.e.*, June 30, 2006). It includes any employees that were hired subsequent to that date and through the true-up period; and eliminates any employees that had been terminated during that period. Staff's annualization takes into effect any union labor rate increases and any changes in positions of the employees that would cause their salary to change. Staff takes an individual's hourly rate and multiplies it by the number of hours given the employee's position (including overtime amounts, shift differentials, etc.) and then arrives at an annualized salary amount for each employee. Staff takes the annualized salary amount for each employee and factors it up for payroll taxes.²³⁷

148. Like the Company, Staff annualized payroll and payroll tax for each employee whether they were working in a specific district, or at the corporate office.²³⁸

149. MAWC's witness Edward Grubb testified that he reviewed Staff's work papers and concluded that Staff properly calculated payroll and payroll tax.²³⁹

150. Ms. Jones again sought to change her prefiled testimony with regard to this issue and stated that she wished to change lines 14 through 17 of her prefiled testimony to read as follows: "The payroll and payroll tax annualization under Administrative and General Expenses does not flow or follow with the payroll annualization contained in the Staff schedules. While I find no problem with the payroll normalization, the

²³⁵ Transcript p. 221 (Testimony of Donald J. Petry). See also Exhs. MAWC-16 and 17.

²³⁶ Transcript pp. 219-227 (Testimony of Donald J. Petry). See also Exhs. MAWC-16 and 17.

²³⁷ Transcript p. 241-251 (Testimony of Lisa Hanneken). See also Hearing Exhs. Staff-3 and 4. Lisa Hanneken serves the Commission in the position of Utility Regulator Auditor IV. She holds a Bachelors Degree in Accounting and a Masters of Business Administration with an emphasis on Accounting. She has provided subject matter expert testimony in multiple cases before the Commission. Exh. Staff-3, p. 2 and Schedule 1.

²³⁸ Transcript p. 243 (Testimony of Lisa Hanneken). See also Exhs. Staff-3 and 4.

²³⁹ Transcript p. 187-188 (Testimony of Edward Grubb). See also Exhs. MAWC-6, 7, 8 and 9.

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payroll and payroll tax annualization should follow directly the payroll annualization since payroll taxes are a direct percentage of payroll.”

151. When asked to clarify what her position was on payroll annualization at hearing, Ms. Jones testified: “And that would be on the corporate schedule. Particularly, the salaries line item where the -- the test year number is 200. I'm sorry. I don't have that -- that one on me. But it's 200 and basically nine -- 290,000 for the test year, which is a full year. And the annualized number is much closer to 800,000. And the question is how, by annualizing from a full year, do you increase that much? And then the payroll taxes follow that -- that amount of the payroll annualization.”²⁴⁰

152. Ms. Jones provided no accounting schedules to demonstrate her method of payroll annualization and demonstrate how Staff and MAWC had, in any way, miscalculated these values.

153. Ms. Jones did not delineate how her method of payroll annualization would affect Joplin's, or any other District's, portion of MAWC's revenue requirement. In fact, in its Statement of Filing of Calculations (filed August 22, 2007), the City of Joplin states that “there is no direct revenue impact upon the payroll tax annualization and payroll annualization discussed in Leslie Jones' testimony on August 14, 2007.”

Findings of Fact Regarding the Live Testimony of the Witnesses

154. MAWC's witnesses Edward Grubb and Donald Petry, Staff's witnesses Steven Rackers and Lisa Hanneken, and Joplin's witness Leslie Jones all prefiled testimony and presented live testimony before the Commission with regard to Joplin's issues.²⁴¹

155. Mr. Grubb, Mr. Petry, Mr. Rackers and Ms. Hanneken have all served as subject matter experts in numerous utility rate cases.²⁴²

156. Ms. Jones has not served as a subject matter expert in any prior utility rate case.²⁴³

157. Mr. Grubb, Mr. Petry, Mr. Rackers and Ms. Hanneken all provided extensive pre-filed testimony in this matter addressing the allocation factors in dispute.²⁴⁴

158. Ms. Jones provided three pages of pre-filed testimony composed of conclusory statements.²⁴⁵

²⁴⁰ Transcript p. 355 (Testimony of Leslie Jones).

²⁴¹ See Footnote Numbers 187 (Grubb), 188 (Petry), 190 (Rackers), 197 (Jones) and 237 (Hanneken) for biographical information on these witnesses.

²⁴² See Footnote Number 241, *supra*.

²⁴³ Ms. Jones testified that this was the first utility rate case that she had personally been involved with. Transcript p. 407.

²⁴⁴ Exhs. MAWC MAWC-6, 7, 8, 9, 16, and 17; Staff-3, 4, 5, 6, 7, 28, 29, 30, 31, and 32.

²⁴⁵ Exh. Joplin-1.

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159. Mr. Grubb, Mr. Petry, Mr. Rackers and Ms. Hanneken provided extensive documentary support with regard to their respective positions on the proper allocation factors, via various accounting schedules.²⁴⁶

160. Ms. Jones provided virtually no documentary support for her positions, providing only three pages of calculations when compelled by the Commission to produce them.²⁴⁷

161. While on the witness stand, Mr. Grubb, Mr. Petry, Mr. Rackers and Ms. Hanneken were composed, confident, sincere, and unwavering in their testimony.

162. Ms. Jones demeanor on the witness stand was anxious, defensive, and wavering.

163. Mr. Grubb, Mr. Petry, Mr. Rackers and Ms. Hanneken were articulate and their testimony at the hearing was consistent with their pre-filed testimony.

164. Ms. Jones's testimony at the hearing was inconsistent with her pre-filed testimony; in fact, it represented a complete and sudden change in position.

165. Ms. Jones's testimony at the hearing was also internally inconsistent and contradictory throughout its presentation and duration.²⁴⁸

166. The testimony provided by Mr. Grubb, Mr. Petry, Mr. Rackers and Ms. Hanneken was substantial, credible and unbiased.

167. Ms. Jones's testimony was insubstantial, non-credible, and self-serving.

168. Ms. Jones's testimony was biased by her own admission.²⁴⁹

Conclusions of Law Regarding Joplin's Issues

Allocation of costs is not an exact science or a process that has only a single correct answer. The Missouri Supreme Court has stated that it is "the province and duty of the commission, in determining the questions of reasonable rates, to allocate and treat costs . . . in the way in which, in the commission's judgment, the most sound result is reached."²⁵⁰

As Mr. Grubb appropriately noted in his testimony, the choice of allocation factors should be reasonable and promote consistency.²⁵¹

²⁴⁶ See Footnote 241.

²⁴⁷ See Statement of Filing of documents Pursuant to Commission's Order of August 15, 2007, filed August 22, 2007.

²⁴⁸ See Findings of Fact Numbers 111-155.

²⁴⁹ *Id.*

²⁵⁰ State ex rel. City of West Plains v. Public Service Commission, 310 S.W.2d 925, 933 (Mo. banc 1958).

²⁵¹ Transcript p. 178 (Testimony of Edward J. Grubb).

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Noting that “allocation factors are used to allocate those costs which cannot be directly assigned to a particular customer class,” the Commission has previously found that the proper method for allocating administrative and general expenses is on the basis of direct payroll (*i.e.*, labor).²⁵² The Commission further stated “. . . that it is through its employees that the coordination and management of all facets of its operations are conducted, and that therefore the proper method to allocate costs associated with those employees’ expenses is by direct labor.”²⁵³

Conclusions of Law: Issue 1

Considering the chronology of events surrounding Joplin’s last-minute change of position, and the lack of evidentiary support for any of the positions put forth by Joplin, the Commission concludes that Joplin is merely attempting to arbitrarily shift costs away from Joplin to the other districts.²⁵⁴ Joplin was fully advised of Staff’s correction to the length of main allocator calculation well in advance of hearing, yet as late as August 10, after being so advised, Joplin steadfastly maintained its position that corporate administrative and general expenses should be allocated based on length of main.

On Tuesday, August 14, following the testimony of MAWC and Staff witnesses and, more importantly, hearing the corrected number of linear feet of main in the St. Louis County District, (a calculation Ms. Jones had not independently confirmed prior to hearing) Ms. Jones took the witness stand, and attempted to “correct” her testimony and her position regarding the proper allocation of corporate costs. Ms. Jones gave dramatically contradictory reasons for having changed her positions further suggesting her change of position was a spur of the moment decision. It is clear to the Commission that Ms. Jones did not change her testimony based upon a belief that her newly selected allocation factors were, in fact, more appropriate allocators, but rather because Staff’s correction caused her initially preferred allocation factor (*i.e.*, length of mains) to increase from .011% to 7.105%.

Had Ms. Jones stuck with her initial position that the “amount of usage of corporate services is directly tied to infrastructure on the ground”

²⁵² *In Re: Union Electric*, 27 Mo. P.S.C.(N.S.) 183, 275 & 290, 66 PUR4th 202(1985).

²⁵³ (27 Mo.P.S.C.(N.S.) at 290)

²⁵⁴ It is also important to note that when Joplin proposes to shift costs away from its district, those costs flow to other districts. So while Joplin may get the benefit of a reduced revenue requirement, it has done so at the expense of one or more other districts. As Joplin witness Jones acknowledged in response to questioning from the bench – “. . . obviously, the revenue requirement for Joplin should go down. By how much, I cannot tell you. And, . . . that would make the revenue requirement for some other districts increase.” (Tr. 415, 416)

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(i.e., lengths of mains), and used the corrected allocation factor for length of mains, she would have allocated more costs to the Joplin District than allocating by either Staff or the proposal in the Global Agreement. Ms. Jones revealed the true purpose of changing her testimony when she testified that she was going to be as favorable to Joplin as possible and that she was more comfortable with using pipe length as an allocation factor when the length of main allocator was very small (i.e., .011%).

Joplin provided no credible evidence that its shifting position on these allocation factors was superior to those factors agreed to by the signatory parties to the Global Agreement. Moreover, Joplin provided no evidence that the allocation factors agreed to by the signatory parties to the Global Agreement were in any way unjust or unreasonable.

As a result of the compromises in Global Agreement, the allocation of costs to Joplin is actually less than it would be under a strict application of district-specific costs, resulting in a revenue increase for the Joplin District that is far less than it would be under a strict district-specific cost of service allocation.²⁵⁵ Joplin's main professed concern with the Global Agreement was that the resulting increase for Joplin was somehow discriminatory. Given that Joplin would receive a much lower revenue increase from the Global Agreement than it would receive using strict district specific pricing, there is no credible argument that the Global Agreement is discriminatory.

Joplin has not demonstrated that the basis for Staff's allocation factors, as incorporated into the Joint Recommendation/Global Agreement is unreasonable, particularly where it now proposes to use many of the same allocation factors as Staff. Subject matter experts Edward J. Grubb,

²⁵⁵ For example, in Staff's True-Up Accounting Schedule (which at the time it was filed assumed a total revenue increase of \$19,493,370 based on Staff's mid-point return on equity of 9.10%) Joplin's revenue increase would be \$4,580,185 using a strict district-specific cost assignment. (Staff True-Up Accounting Schedule 1, Total Company and Joplin District, in Exhibit Staff-29) The Global Agreement proposes an overall revenue increase of \$28,700,000 (Appendix A-1-1), which is approximately \$9 million greater than the Staff's True-Up Accounting Schedules. Factoring up the Joplin increase to reflect Joplin's ratable share of the increase in the revenue requirement deficiency on a total company basis between Staff True-Up Schedule and the Global Agreement would add roughly \$670,060 to the Joplin District revenue requirement on a district specific basis. (Revised Reconciliation, filed September 7, 2007) Thus, the total revenue requirement on a district specific basis for Joplin would be \$5,250,245 (\$4,580,185 + \$670,060), prior to correction for chemicals. In contrast, the Global Agreement proposes that Joplin's share of this stipulated total water revenue requirement deficiency of \$28,579,683 is only \$4,856,240, prior to the correction for chemicals (See FOF Numbers 28-29, 57-62, 107, 126, and 144, *supra*; the Global Agreement, filed August 9, 2007; and Staff's Revised Reconciliation, filed September 7, 2007).

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Donald J. Petry and Stephen Rackers attested to the reasonableness of the Global Agreement and all of its elements, including the chosen allocation factors.²⁵⁶ The Commission concludes that the allocation factors agreed to by the signatories to the Joint Recommendation, as embodied in the Global Agreement, are not only reasonable, but are supported by competent and substantial evidence as being the most reasonable and appropriate methods for allocating the costs in dispute.

Conclusions of Law: Issue 2

The payroll and payroll tax annualization reflects actual employee levels as of the end of the true-up period and reasonably reflects a going-forward level of payroll and payroll tax expense that MAWC will likely incur at the time rates set in this proceeding will become effective.²⁵⁷ Joplin offered no evidence to support its position that the method of payroll and payroll tax annualization executed by Staff is in error. Similarly, it offered no calculation of an alternative payroll and payroll tax annualization amount. Joplin merely offers a conclusory statement that Payroll was inappropriately annualized. Under the circumstances, not only is Staff's calculation of payroll and payroll tax appropriate, there is no credible evidence to suggest otherwise. Moreover, Joplin has affirmatively pled that "there is no direct revenue impact upon the payroll tax annualization and payroll annualization discussed in Leslie Jones' testimony on August 14, 2007." Consequently, it is unclear what, if any, objection Joplin continues to have with the payroll and payroll tax annualization amounts. The Commission concludes that Staff's payroll and payroll tax annualization, as embodied in the Joint Recommendation/Global Agreement, is accurate and reasonable.

Local 335's Issues

As noted in the procedural history, Local 335 did not join the other parties in their motion to modify and limit the issues list. Local 335 considers the three issues it raised during the course of this proceeding to be live issues and the Commission issued a notice stating it would consider all record evidence in this matter addressing Local 335's issues.²⁵⁸

Findings of Fact Regarding Local 335's Issues

²⁵⁶ Transcript pp. 178-180 (Testimony of Edward J. Grubb); pp. 230-231 (Testimony of Donald J. Petry); pp. 319-320 (testimony of Stephen Rackers). Mr. Grubb further testified that there was no "anti-Joplin" animus exhibited by Staff at any time. Transcript pp. 189-190.

²⁵⁷ Transcript pp. 247-259.

²⁵⁸ See Order Granting Motion to Modify Order and Amend Issues List, issued August 30, 2007, Local 335's Advice to the Commission, filed September 4, 2007, and Notice Regarding Issues List, issued September 5, 2007.

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169. The issues raised by Local 335 were:
1. whether MAWC has provided adequate training of its employees in dealing with asbestos-cement and lead-jointed pipe;
 2. whether funds should be allocated to employee training or the removal of asbestos-cement and lead-jointed pipe; and
 3. whether MAWC has properly asserted privilege with regard to payroll information.²⁵⁹

170. Local 335 affirmatively pled that it did not oppose the outcome of the case as proposed in the Global Agreement, and that it recognized that the issues it raised may not be outcome determinative for this matter.²⁶⁰

171. Local 335 failed to appear at the evidentiary hearing. Because Local 335 failed to appear at hearing, it is subject to dismissal as a party to this action pursuant to Commission Rule 4 CSR 240-2.116(3).

172. Because Local 335 failed to appear at hearing, it was not present to formally offer the testimony of its witness, Alan Ratterman into evidence, or to defend that offering from objections from the other parties. The mere pre-filing of testimony is not a formal offer of evidence into the record.²⁶¹

173. Mr. Ratterman's testimony was prefiled as "rebuttal" testimony and addressed issues 1 and 2 in Finding of Fact Number 169 above.

174. Mr. Ratterman's rebuttal testimony did not rebut any other witness's direct testimony as required by Commission Rule 4 CSR 240-2.130(7)(B). While a party is not required to file direct testimony, rebuttal testimony must be responsive to direct testimony.²⁶²

175. The objections to Mr. Ratterman's testimony based upon it

²⁵⁹ *Id.*

²⁶⁰ Local 335's *Advice to the Commission*, filed September 4, 2007.

²⁶¹ Exh. Local 335-1, Ratterman Rebuttal, filed July 13, 2007. On July 31, 2007, Local 335 filed a motion to refile Mr. Ratterman's testimony to include two exhibits that it had failed to file on July 13, 2007. Also on July 31, 2007, MAWC filed a motion to strike Mr. Ratterman's rebuttal testimony.

²⁶² Commission Rule 4 CSR 240-2.130(7)(B) is not ambiguous and states that "where all parties file direct testimony, rebuttal testimony shall include all testimony which is responsive to the testimony and exhibits contained in any other party's direct testimony."

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being improper rebuttal were sustained at hearing and Mr. Ratterman's prefiled rebuttal testimony was excluded from the record.²⁶³

176. The only remaining evidence offered into the record by Local 335 was Mr. Ratterman's live testimony at the local public hearing held in Kirkwood, Missouri on June 13.²⁶⁴

177. The only issue raised by Mr. Ratterman at the public hearing was issue 3 in Finding of Fact Number 169 above regarding whether MAWC properly raised privilege with respect to disclosing certain payroll information.²⁶⁵

178. Mr. Ratterman's statements at the local public hearing were conclusory in nature and did not provide a proper legal basis to support an argument regarding MAWC's exercise of privilege.

179. The Commission has a proper procedure for challenging the classification of information in Rule 4 CSR 240-2.135(2)(B); a procedure that Local 335 elected not to follow.

Conclusions of Law Regarding Local 335's Issues

The evidentiary rules ensure a level playing field for all of the parties and prevent undue surprise and prejudice to any party. If Local 335 wished to present its case-in-chief regarding its issues, the proper procedure would have been to file Mr. Ratterman's testimony as direct testimony. Local 335's failure to follow proper procedure in this matter has essentially left the Commission with only Mr. Ratterman's conclusory statements from the local public hearing in Kirkwood for its review.²⁶⁶

²⁶³ Transcript, p. 443 While Local 335 filed a written response to MAWC's objections that were first raised in a Motion to Strike filed on July 31, Local 335's circular arguments that not filing direct testimony negated the rule on rebuttal testimony, or that the Commission should waive its rules, are not persuasive.

²⁶⁴ Local Public Hearing, Kirkwood, Missouri, June 13, 2007, Transcript Volume 9, pp. 9-11.

²⁶⁵ *Id.*

²⁶⁶ The pleadings of Local 335's attorneys are also of no consequence, because it is well established legal doctrine that unsworn statements of attorneys or parties, statements in briefs, pleadings, motions, arguments, allegations, or charging documents, as well as articles or exhibits not formally or constructively introduced are not evidence of the facts asserted unless conceded to by the opposing party. *State ex rel. TWA, Inc. v. David*, 158 S.W.3d 232, 236 (Mo. Banc 2005) (Judge White Dissenting), citing to, *State ex rel. Dixon v. Darnold*, 939 S.W.2d 66, 69 (Mo. App. 1997); *State v. Smith*, 154 S.W.3d 461, 469 (Mo. App. 2005); *Lester v. Sayles*, 850 S.W.2d 858, 864 (Mo. Banc 1993); *State v. Rutter*, 93 S.W.3d 714, 727 (Mo. Banc 2002); *State v. Robinson*, 825 S.W.2d 877, 880 (Mo. App. 1992); *State ex rel. Horn v. Randall*, 275 S.W.2d 758, 763-764 (Mo. App. 1955). No party has conceded to any of the issues raised by Local 335.

Local 335 did not file a pre or post-hearing brief. Local 335's pleading did include: Application to Intervene, filed January 4; Position on Test Year and True-Up Recommendation, filed January 24; Suggestions in Response to the Non-Unanimous Stipulation and Agreement, filed

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Having no substantial or credible evidence in the record upon which to evaluate Local 335's issues, the Commission concludes that Local 335 failed to meet its burden with establishing the need for further training of MAWC's employees or the need to declassify MAWC's salary information.

This is not to say that the Commission does not appreciate, or lacks concern regarding, the issues raised by Local 335. Ensuring the provision of safe and adequate service is of paramount importance to the Commission. These safety issues not only involve MAWC's employees, but also the consumers of the water MAWC provides to its customers. Local 335 has not provided the Commission with evidence in this rate case upon which to fully evaluate these issues, and the rate case may not, in any event, be the appropriate forum to address these issues. Consequently, the Commission will authorize and direct its Staff to conduct an informal investigation case into: (1) whether MAWC provides adequate training of its employees in dealing with asbestos-cement and lead-jointed pipe, (2) whether funds should be allocated to employee training or the removal of asbestos-cement and lead-jointed pipe, and (3) whether MAWC's water customers face health risks in association with the use of asbestos-cement and lead-jointed pipe.

Finally, the Commission notes that while Local 335 has not yet followed proper procedure to challenge the classification of the payroll information it wishes to be made public, there is nothing to prevent Local 335, or Staff, from filing a motion pursuant to Commission Rule 4 CSR 240-2.135(2)(B) to determine whether the requested information may be deemed public.

Capacity Charge Tariffs for Warren and Jefferson Counties

As noted in the procedural history, on April 2, MAWC filed revised sewer tariffs for the purpose of implementing a capacity charge for its Warren County and Jefferson County sewer districts, Tariff File Numbers JS-2007-0713 and JS-2007-0714. These tariff filings were filed outside of the existing rate cases and docketed under Case Number ST-2007-0443. Ultimately ST-2007-0443 was consolidated with this case, and the capacity

August 13; Advice to the Commission, filed September 4; and Proposed Findings of Fact and Conclusions of Law, filed September 17. On September 19, 2007, MAWC moved to strike Local 335's Proposed Findings of Fact and Conclusions of Law asserting that there was no record evidence for the Commission to consider in regard to Local 335's allegedly "live issue," and that; consequently, the Commission should strike Local 335 proposed findings and conclusions. The Commission finds no reason to sustain this motion given there is no record evidence to support Local's 335's Proposed Findings of Fact and Conclusions of Law.

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charge tariffs were suspended to match the suspension date of the rate-case tariffs. Case Number ST-2007-0443 was left open to follow a separate additional procedural schedule and receive filings specifically related to the capacity charge tariffs.

Findings of Fact Regarding Capacity Charge Tariffs

180. In the Global Agreement, the signatories agreed to dispose of all issues in Case Number ST-2007-0443 concerning the capacity charges proposed by MAWC for its sewer districts serving Warren County (Incline Village subdivision) and Jefferson County (Cedar Hill subdivision).²⁶⁷

181. MAWC had originally filed tariffs proposing capacity charges of \$5,500 per new residential customer for those districts.²⁶⁸

182. HBA and the OPC objected to those proposed charges, and the tariffs were suspended by this Commission.²⁶⁹

183. Pursuant to the Global Agreement, the signatories – which include HBA, OPC, Staff, and MAWC – all agreed that capacity charges of \$1,500 per new residential customer would be appropriate.²⁷⁰

184. Those four parties are the only parties that have entered appearances in case Number ST-2007-0443.²⁷¹

185. A schedule of the agreed-to capacity charges for Single Family Residence, Mobile Home, Multi-Family Apartment and Commercial Premise customer classes are specifically described in the specimen tariffs that were attached to the Global Agreement as Exhibit C.²⁷²

186. The capacity charges proposed in the Global Agreement are acceptable to all concerned parties as evidenced by these parties being signatories to the Agreement.²⁷³

187. No party has objected to the capacity charges proposed in the Global Agreement.

188. No party requested a hearing with regard to the capacity charges proposed in the Global Agreement.

²⁶⁷ Non-Unanimous Stipulation and Agreement, paragraph 6, filed August 9, 2007.

²⁶⁸ See Tariff filings JS-2007-0713 and JS-2007-0714, filed April 2, 2007.

²⁶⁹ *Order Suspending Tariffs and Scheduling a Conference*, Case No. ST-2007-0443 (May 31, 2007). *Order Suspending Procedural Schedule*, Case No. ST-2007-0443 (Aug. 10, 2007).

²⁷⁰ Non-Unanimous Stipulation and Agreement, paragraph 6, filed August 9, 2007.

²⁷¹ See Case Number ST-2007-0443.

²⁷² Non-Unanimous Stipulation and Agreement, Appendix C, filed August 9, 2007.

²⁷³ *Id.* at pp. 10-12.

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189. All parties waived cross-examination of any and all witnesses with regard to the capacity charges proposed in the Global Agreement.

190. The Global Agreement resulted from extensive negotiations between parties with diverse interests including public consumer groups, large-use industrial customers, municipalities, a labor union, and the Commission's Staff.

191. Subject matter experts, Edward J. Grubb, Donald J. Petry and Stephen Rackers attested to the reasonableness of the Global Agreement and all of its elements, including the capacity charge tariffs for Warren and Jefferson Counties.²⁷⁴

Conclusions of Law Regarding Capacity Charge Tariffs

After reviewing the proposed capacity charges encompassed in the Global Agreement/Joint Recommendation, and the parties' positions on those charges, the Commission finds the proposed charges to be reasonable.²⁷⁵ The Commission shall allow MAWC to implement its capacity charges in the amount of \$1,500 per new residential customer for the specified districts, and shall require MAWC to file revised tariff sheets in the form attached to the Global Agreement as Exhibit Appendix C.

All Remaining Items in the Global Agreement/Joint Recommendation

The Global Agreement/Joint Recommendation contains several additional items that the Commission must address. These items include the following:

Sewer Rates – The portion of the overall increase to be obtained from MAWC's sewer districts is identified as

²⁷⁴ Transcript pp. 178-180 (Testimony of Edward J. Grubb); pp. 230-231 (Testimony of Donald J. Petry); pp. 319-320 (Testimony of Stephen Rackers).

²⁷⁵ At the hearing on Joplin's opposition to the Global Agreement, MAWC's pre-filed testimony in case no. ST-2007-0443 was admitted into evidence as Hearing Exh. MAWC-26 Testimony of Greg A. Weeks (July 10, 2007). See Transcript pp. 116-119. MAWC prepared the testimony to support its initial proposal for higher capacity charges and, the testimony necessarily also supports the much lower capacity charges presented in the Global Agreement. The other parties – HBA, Public Counsel, and Public Service Commission staff – have not yet filed their own testimony, because the procedural schedule in ST-2007-0443 was suspended pending review of the Global Agreement. In the event that the Commission were to refuse to accept the position in the Global Agreement, the parties have reserved the right to put on additional testimony as discussed at the September 6, 2007 prehearing conference and as discussed the day of hearing in this matter, August 14, 2007.

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follows: \$55,465 in the Warren County district, \$57,552 in the Cedar Hill district and \$7,300 in the Parkville district.

Experimental Consolidated Bill Tariff – MAWC proposed in this case tariff sheets that would implement an experimental consolidated bill tariff for the Company's St. Louis district. This would allow consolidation of customer's bills for contiguous, owner-occupied properties to allow for an aggregation of usage. The signatories propose tariff sheets for this purpose. See Appendix D of the Global Agreement.

OPEBs/FAS 106 Tracker Mechanism and Pensions/FAS 87 Tracker Mechanism – "Tracker" mechanisms concerning both MAWC's Other Post-Employment Benefits (OPEB) and pension costs are recommended. See Appendix E of the Global Agreement.

National Call Center and Shared Services Center Transition Costs – It is recommended that the Commission authorize MAWC to create a regulatory asset associated with the net investment that was made to plan, design and implement the National Call Center and National Shared Services Center utilized by MAWC. This asset would be amortized and recovered in rates over a fifty (50) year period. The mechanism would provide MAWC with recovery of its investment, while not requiring the customers to fund a return on the investment.

Tank Painting Tracker – It is recommended that the Commission authorize MAWC to establish a regulatory asset or liability for tank painting and inspection expense. An asset or liability will be recorded on an annual basis in the amount that actual tank painting and inspection expense is greater than or less than \$1,000,000 in that year. This mechanism addresses an issue where there is disagreement as to whether past expense levels are indicative of future expenses.

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Depreciation Rates – A comprehensive set of depreciation rates, to be effective as of January 1, 2008, are recommended and attached to the Global Agreement as Appendix F.

ISRS (Infrastructure System Replacement Surcharge) – As required by Commission Rule 4 CSR 240-3.650(17) and Section 393.1006.6(1), RSMo 2000, MAWC's current ISRS shall be reset to zero upon the effective date of the new rates in this proceeding. The Signatories agree that for any ISRS filings implemented between the date new rates are established in this proceeding and the effective date of new rates established in MAWC's next general rate increase, the overall rate of return shall be computed by utilizing a 10% return on common equity and the Company's capital structure filing in this case.

Customer Service Reports – It is recommended that MAWC be required to provide certain reports concerning its Call Center performance.

Consumer Service – The Company agrees to respond to Commission Staff inquiries/complaints within specified time periods in a specified form.

Cost Allocation Manual – MAWC agrees to provide an updated cost allocation manual on an annual basis in a specified form.

Weather Reporting – The Company agrees to provide certain billing cycle data in a specified form.

Findings of Fact Regarding Remaining Items in Global Agreement

192. The remaining items proposed in the Global Agreement/Joint Recommendation, as outlined above, are acceptable to all

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concerned parties as evidenced by these parties either being signatories to the Agreement, or by having not objected to these items.²⁷⁶

193. No party has objected to the remaining items, as outlined above, proposed in the Global Agreement.

194. No party requested a hearing with regard to the remaining items, as outlined above, proposed in the Global Agreement.

195. All parties waived cross-examination of any and all witnesses with regard to the remaining items, as outlined above, proposed in the Global Agreement.

196. The Global Agreement resulted from extensive negotiations between parties with diverse interests including public consumer groups, large-use industrial customers, municipalities, a labor union, and the Commission's Staff.

197. Extensive Local Public Hearings were held to receive public comment on the proposed rate increases.²⁷⁷

198. Subject matter experts, Edward J. Grubb, Donald J. Petry and Stephen Rackers attested to the reasonableness of the Global Agreement and all of its elements, including all of the items listed above.²⁷⁸

Conclusions of Law Regarding Remaining Items in Global Agreement

After reviewing the remainder of the items encompassed in the Global Agreement/Joint Recommendation, as outlined above, and the parties' and public's positions on, or lack of position on, those items, the Commission finds the proposed items to be reasonable as adjunctive provisions of the Global Agreement/Joint Recommendation. The Commission shall approval all of the above items as encompassed in the Joint Recommendation.

Final Decision

Joplin was the only party to this action that opposed the Global Agreement. Joplin's opposition was limited to two issues related to District Specific Pricing. The Commission has determined that the positions of the joint signatories with regard to those issues were supported by substantial and credible evidence on the record as a whole. The Commission further discharged its statutory duty with regard to determining what constituted just and reasonable rates for MAWC. The Commission went to great lengths to

²⁷⁶ Non-Unanimous Stipulation and Agreement, pp. 10-12, filed August 9, 2007.

²⁷⁷ See procedural history section of this Report and Order. See also Transcript, Volumes 3-11.

²⁷⁸ Transcript pp. 178-180 (Testimony of Edward J. Grubb); pp. 230-231 (Testimony of Donald J. Petry); pp. 319-320 (Testimony of Stephen Rackers).

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ensure that all due process requirements were satisfied and that all parties had an opportunity to fully litigate any issue identified in this matter.

Having found in favor of the joint signatories with regard to the only issues in dispute, and having found all of the components of the Joint Recommendation to be just and reasonable, the Commission will adopt the Joint Recommendation of the signatory parties, as embodied in the Global Agreement, in its entirety. The Commission shall direct the parties to comply with the terms of the Global Agreement in all respects.

IT IS ORDERED THAT:

1. The Joint Recommendation, as embodied in the Non-Uniform Stipulation and Agreement, filed on August 9, 2007, it approved in its entirety.

2. The signatory parties shall comply with the terms of the Non-Uniform Stipulation and Agreement, filed on August 9, 2007. A copy of the Agreement is attached to this order.

3. The proposed water service tariff sheets submitted under Tariff File Nos. YW-2007-0407, YW-2007-0409, YW-2007-0410, YW-2007-0411, YW-2007-0412, and YW-2007-0413 on December 15, 2006, by Missouri-American Water Company for the purpose of increasing rates for water service to customers are rejected. The specific sheets rejected are:

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P.S.C. Mo. No. 6

13th Revised Sheet No. RT 1.0, Canceling 12th Revised Sheet No. RT 1.0
13th Revised Sheet No. RT 2.0, Canceling 12th Revised Sheet No. RT 2.0
13th Revised Sheet No. RT 2.1, Canceling 12th Revised Sheet No. RT 2.1
13th Revised Sheet No. RT 2.2, Canceling 12th Revised Sheet No. RT 2.2
10th Revised Sheet No. RT 2.3, Canceling 9th Revised Sheet No. RT 2.3
12th Revised Sheet No. RT 2.6, Canceling 11th Revised Sheet No. RT 2.6
10th Revised Sheet No. RT 3.0, Canceling 9th Revised Sheet No. RT 3.0
9th Revised Sheet No. RT 3.1, Canceling 8th Revised Sheet No. RT 3.1
11th Revised Sheet No. RT 4.0, Canceling 10th Revised Sheet No. RT 4.0
13th Revised Sheet No. RT 5.0, Canceling 12th Revised Sheet No. RT 5.0
13th Revised Sheet No. RT 5.1, Canceling 12th Revised Sheet No. RT 5.1
13th Revised Sheet No. RT 5.2, Canceling 12th Revised Sheet No. RT 5.2
13th Revised Sheet No. RT 6.0, Canceling 12th Revised Sheet No. RT 6.0
13th Revised Sheet No. RT 7.0, Canceling 12th Revised Sheet No. RT 7.0
13th Revised Sheet No. RT 8.0, Canceling 12th Revised Sheet No. RT 8.0
2nd Revised Sheet No. RT 10.0(a), Canceling 1st Revised Sheet No. RT 10.0(a)

P.S.C. Mo. No. 3

11th Revised Sheet No. 1, Canceling 10th Revised Sheet No. 1
7th Revised Sheet No. 2, Canceling 6th Revised Sheet No. 2
4th Revised Sheet No. 2A, Canceling 3rd Revised Sheet No. 2A
9th Revised Sheet No. 3, Canceling 8th Revised Sheet No. 3
11th Revised Sheet No. 1, Canceling 10th Revised Sheet No. 1
10th Revised Sheet No. 4, Canceling 9th Revised Sheet No. 4
2nd Revised Sheet No. 5A, Canceling 1st Revised Sheet No. 5A

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P.S.C. Mo. No. 2

12th Revised Sheet No. 3, Canceling 11th Revised Sheet No. 3
7th Revised Sheet No. 5, Canceling 6th Revised Sheet No. 5
9th Revised Sheet No. A-1, Canceling 8th Revised Sheet No. A-1
6th Revised Sheet No. A-2, Canceling 5th Revised Sheet No. A-2
6th Revised Sheet No. A-3, Canceling 5th Revised Sheet No. A-3
9th Revised Sheet No. B-1, Canceling 8th Revised Sheet No. B-1
6th Revised Sheet No. B-2, Canceling 5th Revised Sheet No. B-2
6th Revised Sheet No. B-3, Canceling 5th Revised Sheet No. B-3
9th Revised Sheet No. C-1, Canceling 8th Revised Sheet No. C-1
6th Revised Sheet No. C-2, Canceling 5th Revised Sheet No. C-2
6th Revised Sheet No. C-3, Canceling 5th Revised Sheet No. C-3
10th Revised Sheet No. D-1, Canceling 9th Revised Sheet No. D-1
6th Revised Sheet No. D-2, Canceling 5th Revised Sheet No. D-2
6th Revised Sheet No. D-3, Canceling 5th Revised Sheet No. D-3
8th Revised Sheet No. E-1, Canceling 7th Revised Sheet No. E-1
6th Revised Sheet No. E-2, Canceling 5th Revised Sheet No. E-2
6th Revised Sheet No. E-3, Canceling 5th Revised Sheet No. E-3
6th Revised Sheet No. E-4, Canceling 5th Revised Sheet No. E-4

P.S.C. Mo. No. 1

12th Revised Sheet No. 1, Canceling 11th Revised Sheet No. 1
1st Revised Sheet No. 1b, Canceling Original Sheet No. 1b
8th Revised Sheet No. 2, Canceling 7th Revised Sheet No. 2

P.S.C. Mo. No. 7

1st Revised Sheet No. 4, Canceling Original Sheet No. 4

4. The proposed sewer service tariff sheets submitted under Tariff File Nos. YS-2007-0415, YS-2007-0416, and YS-2007-0417 on December 15, 2006, by Missouri-American Water Company for the purpose of increasing rates for sewer service to customers are rejected. The specific sheets rejected are:

P.S.C. Mo. No. 8

3rd Revised Sheet No. 4, Canceling 2nd Revised Sheet No. 4

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P.S.C. Mo. No. 2

3rd Revised Sheet No. 4, Canceling 2nd Revised Sheet No. 4

P.S.C. Mo. No. 7

1st Revised Sheet No. 9, Canceling Original Sheet No. 9

5. The proposed capacity charge tariff sheets submitted under Tariff File Nos. JS-2007-0713, and JS-2007-0714 on April 2, 2007, by Missouri-American Water Company for the purpose of increasing rates for sewer service to customers are rejected. The specific sheets rejected are:

PSC Mo. - No 8

Jefferson County (Cedar Hill) District

Original Sheet No. 4a

Original Sheet No. 16a

Original Sheet No. 16b

Original Sheet No. 16c

PSC Mo. - No 7

Warren County (Incline Village et al.) District

Original Sheet No. 9a

Original Sheet No. 9b

Original Sheet No. 9c

6. Missouri American Water Company may file proposed water service tariff sheets in compliance with this Report and Order.

7. Missouri American Water Company may file proposed sewer service tariff sheets in compliance with this Report and Order.

8. Missouri American Water Company may file proposed capacity charge service tariff sheets in compliance with this Report and Order.

9. Pursuant to Commission Rule 4 CSR 240-3.650(17) and Section 393.1006.6(1), RSMo 2000, MAWC's current Infrastructure System Replacement Surcharge is reset to zero upon the effective date of the new rates in this proceeding. Any new ISRS filings implemented between the dates the new rates are established in this proceeding and the effective date of new rates established in Missouri American Water Company's next rate case proceeding shall follow the terms established for said filing in the Joint Recommendation, as embodied in the Non-Unanimous Stipulation and Agreement filed on August 9, 2007.

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10. The Staff of the Missouri Public Service Commission is hereby authorized and directed to conduct an informal investigation into the issues raised by Utility Workers Union of America Local 335, AFL-CIO Local 335 as directed in the body of this order. The Staff shall file a report of this informal investigation with the Commission under this case number, WR-2007-0216.

11. All pending motions, not otherwise disposed of herein, are hereby denied.

12. Any witness not finally excused by the Commission prior to the issuance of this Report and Order is hereby finally excused.

13. This Report and Order shall become effective on October 14, 2007.

Davis, Chm., Clayton, Appling, and
Jarrett, CC., concur;
Murray, C., concurs, with separate
concurring opinion attached;
and certify compliance with the provisions
of Section 536.080, RSMo.

NOTE: See pages 361 and 367 for another order in this case.

**The Staff of the Missouri Public Service Commission v. Missouri
Pipeline Company, LLC, and Missouri Gas Company, LLC**

*Case No. GC-2006-0491
Decided: October 11, 2007*

Accounting §7. The Commission allowed Staff to make an adverse evidentiary inference when the utility, through gross incompetence, failed to retain and produce for review either a paper or electronic copy of customer invoices.

Evidence, Practice and Procedure §2. The Commission has no jurisdiction to promulgate an order requiring a pecuniary reparation or refund.

Evidence, Practice and Procedure §19. The Commission allowed Staff to make an adverse evidentiary inference when the utility, through gross incompetence, failed to retain and produce for review either a paper or electronic copy of customer invoices.

Gas §18. The Commission did not need to consider ratemaking factors when acting to enforce an existing tariff rather than exercising its ratemaking authority.

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Gas §28. The respondent intrastate pipeline companies violated their tariffs and the Commission's affiliate transaction rule by allowing their gas marketing affiliate access to what should have been confidential information about operations on the pipeline

Gas §28. The respondent intrastate pipeline companies provided discounted services to an affiliated gas marketing company and by the terms of their tariffs, were required to offer the same discounted rates to nonaffiliated gas marketing companies.

Gas §41. The respondent intrastate pipeline companies violated their tariffs and the Commission's affiliate transaction rule by allowing their gas marketing affiliate access to what should have been confidential information about operations on the pipeline

Gas §41. The respondent intrastate pipeline companies' tariffs do not require every transportation customer who receives natural gas delivered through the pipeline to have executed a transportation agreement.

Gas §41. The respondent intrastate pipeline companies provided discounted services to an affiliated gas marketing company and by the terms of their tariffs, were required to offer the same discounted rates to nonaffiliated gas marketing companies.

Gas §41The respondent intrastate pipeline companies violated their tariffs by failing to report offers of discounted transportation service to the Commission's Staff.

Appearances

Lera L. Shemwell, Deputy General Counsel, and **Steven C. Reed**, Litigation Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

Paul S. DeFord, Lathrop and Gage, L.C., 2345 Grand Boulevard, Suite 2800, Kansas City, Missouri 64108, and **Aimee D.G. Davenport**, Lathrop and Gage, L.C., 314 E. High Street, Jefferson City, Missouri 65101, for Missouri Pipeline Company, LLC, and Missouri Gas Company, LLC.

David L. Woodsmall, Finnegan, Conrad & Peterson, L.C., 428 East Capitol Avenue, Suite 300, Jefferson City, Missouri 65102-0148, for the Municipal Gas Commission of Missouri.

Marc D. Poston, Senior Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel.

Colly J. Durley, Smith Lewis, LLP, 111 South Ninth Street, Suite 200, Columbia, Missouri 65205-0918, for Union Electric Company d/b/a AmerenUE.

REGULATORY LAW JUDGE: Morris L. Woodruff, Deputy Chief Regulatory Law Judge

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REVISED REPORT AND ORDER

Syllabus: The Commission is issuing this Revised Report and Order in response to the applications for rehearing filed by the Municipal Gas Commission of Missouri and Union Electric Company d/b/a AmerenUE. The changes to the order relate to certain conclusions of law regarding the interpretation of the tariffs of Missouri Pipeline Company and Missouri Gas Company relating to Count III of Staff's complaint

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Procedural History

On June 21, 2006, the Staff of the Commission filed a complaint against Missouri Pipeline Company, LLC (MPC), and Missouri Gas Company, LLC (MGC). The complaint contains six counts alleging that MPC and MGC have violated several aspects of their tariffs. Staff developed this case as an offshoot from a broader over-earnings complaint Staff filed against MPC and MGC, as well as several affiliated companies, on March 31, 2006. That over-earnings complaint was pending before the Commission as Case No. GC-2006-0378, but, at the request of Staff, was dismissed without prejudice on June 25, 2007.

By a notice issued on June 22, 2006, pursuant to Commission Rule 4 CSR 240-2.070(7), the Commission served a copy of Staff's complaint on MPC and MGC. That order also provided notice of the filing of Staff's complaint to the other parties to GC-2006-0378, and established an intervention deadline of July 12, 2006. Subsequently, Union Electric Company, d/b/a AmerenUE, and the Municipal Gas Commission of Missouri were allowed to intervene. MPC and MGC timely responded to Staff's complaint by filing their answer on July 21, 2006.

The Commission established a procedural schedule requiring the parties to prefile written direct, rebuttal, and surrebuttal testimony. An evidentiary hearing convened on December 13, and continued on December 14 and 15, 2006. Initial post-hearing briefs were submitted on

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February 9, 2007, with reply briefs following on February 20. Additional oral arguments were held on July 10, 2007.

The Operations of MPC and MGC

MPC and MGC own and operate interconnected, intrastate natural gas pipeline systems located in east central Missouri. The natural gas flowing through MPC's pipeline is obtained from two interconnections with interstate pipelines. The first interconnection is with Panhandle Eastern Pipeline Company in Pike County, Missouri. The MPC pipeline then runs south and east into St. Charles County, Missouri, where it terminates with a connection to Missouri Interstate Gas. Missouri Interstate Gas, in turn, owns and operates a 5.6-mile pipeline that runs under the Mississippi River and interconnects with a major interstate natural gas pipeline, Mississippi River Transmission, in Illinois. A branch of MPC's pipeline extends southwesterly from St. Charles County, through Franklin County, to a southern terminus at Sullivan, Missouri.

At Sullivan, the MPC pipeline connects with the pipeline owned and operated by MGC. The MGC pipeline then extends another 66 miles, terminating at the United States Army facility, Fort Leonard Wood. Along the way, MGC's pipeline also provides gas to the towns of St. James, Cuba, Waynesville, St. Robert, Rolla, Salem, and Owensville.¹

MPC and MGC are transporters of gas, not sellers of gas. That means they collect a fee for transporting the gas that various shippers purchase from gas suppliers and move through the pipelines. Shippers on the pipeline include other public utilities, notably Laclede Gas Company and AmerenUE, who move gas through the pipelines for delivery to the homes and businesses of their customers. Other shippers are municipal gas distribution systems and large industrial users who purchase their own gas supply.

The Operations of Omega Pipeline Company

The third pipeline company that is important to Staff's complaint is Omega Pipeline Company. Omega owns and operates the natural gas distribution system on Fort Leonard Wood, a federal enclave. In its role as a local distribution company, operating exclusively at Fort Leonard Wood, Omega is not subject to regulation by this Commission.² However, after July 1, 2003, Omega was also used as a gas marketing company, providing

¹ Ries Rebuttal, Ex. 304, Pages 4-5.

² The Federal government has exclusive jurisdiction over federal enclaves pursuant to Article I, Section 8 of the United States Constitution.

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gas-marketing services³ to several entities that obtained natural gas through MPC or MGC. Omega's role as a gas marketer is the role about which Staff is concerned in its complaint.

Ownership of MPC, MGC, Omega, and Affiliated Companies

MPC and MGC, as well as Missouri Interstate Gas, are owned by United Pipeline Systems, Inc., which was formerly known as Utilicorp Pipeline Systems, Inc. United Pipeline is owned by Gateway Pipeline Company, LLC, which purchased the stock of Utilicorp Pipeline Systems in 2002, from the company now known as Aquila, Inc.⁴ Moving up the corporate ownership chain, Gateway is ultimately owned by two individuals, Dennis Langley (85%) and David Ries (15%).⁵ As sister corporations sharing a common ownership, MPC and MGC are "affiliated entities", as that term is defined by the Commission's affiliate transaction rule.⁶ Along with MPC and MGC, Gateway also purchased Omega Pipeline Company from Aquila in 2002. Thus, until it was sold to Tortoise Capital Resources Corporation on June 1, 2006, Omega was also an affiliate of MPC and MGC.

Staff's Motion for Sanctions for Destruction of Documents

On November 14, 2006, Staff filed a motion asking the Commission to impose monetary sanctions against MPC, MGC, and their President, David Ries, for allegedly destroying certain invoices that Staff needs to support its case. In addition, Staff asked the Commission to apply the spoliation of evidence rule to make certain evidentiary inferences adverse to MPC and MGC. On December 5, after several rounds of written responses were submitted by MPC and MGC, as well as by Staff, the Commission informed the parties that it would take up Staff's motion as a part of the evidentiary hearing. The Commission also informed the parties that they would be allowed to present additional live direct testimony on that question. Much of the first day of the hearing was spent hearing testimony on Staff's motion.

In January 2006, early in its investigation, Staff sought production of invoices showing the bills that MPC and MGC sent to their customers.⁷ At that time, David Ries informed Staff that those actual invoices were not

³ Gas marketing services include purchase of gas supplies, administration of contracts, and monitoring of the nomination process required to transport gas,

⁴ Id.

⁵ Schallenberg Direct, Ex. 19, Schedule 3, Page 4.

⁶ Commission Rule 4 CSR 240-40.015(1)(A).

⁷ A copy of Staff's subpoena to B. J. Lodholz, CFO/Comptroller for MPC and MGC is Ex. 251.

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retained in the companies' records.⁸ Ries indicated that the original paper invoices were mailed to the customers and the companies did not retain a copy for their own records.⁹ Instead, of invoices, Ries provided Staff with a revenue summary document for 2005.¹⁰ That summary spreadsheet does not reveal the existence of additional customers being served through pipeline capacity held by the City of Cuba.¹¹ Subsequently, in June 2006, Staff obtained what it described as recreated invoices for 2004 and 2005 from MPC and MGC. Staff has never obtained 2003 invoices from MPC and MGC.¹² Ries testified in his deposition that the companies did not provide the 2003 invoices to Staff because "[w]e don't have any paper copies of them and it would require an extreme amount of effort and diligence to go back and recreate them."¹³

Since it could not obtain actual invoices from MPC and MGC, Staff contacted various customers, attempting to obtain copies of the invoices the customers received from MPC and MGC. Actual invoices received from Cuba revealed that some of the gas that MPC and MGC showed as delivered to Cuba was actually being delivered to other customers.¹⁴

Because of these inconsistencies, Staff suspected the accuracy of the recreated invoices, but continued to rely on the recreated invoices in developing its complaint. Then, on July 17, 2006, Staff deposed B. J. Lodholz, the former CFO/Controller of MPC and MGC. Lodholz revealed that he kept paper copies of the "summary sheet, the front page" of the invoices in his office. Lodholz indicated that he had kept those summary sheets all the way back to when he started working for MPC and MGC in July 2002.¹⁵

Believing they had now found the original invoices they were seeking, Staff directed Ries to bring those documents from Lodholz's files to his October 17, 2006, deposition. At his deposition, Ries produced actual copies of the face sheets from the invoices,¹⁶ but indicated that the complete documents that Staff sought were not in Lodholz's files. Ries also

⁸ Transcript, Pages 50-51, Lines 21-25, 1-12.

⁹ Transcript, Page 146, Lines 8-16.

¹⁰ That spreadsheet is Ex. 53HC.

¹¹ Transcript, Pages 70-71, Lines 19-25, 1-8.

¹² Transcript, Page 91, Lines 20-22.

¹³ This portion of Ries' deposition is Ex. 257, Page 700, Lines 23-25. The deposition was also read into the record at the hearing and may be found at Transcript, Page 106, Lines 1-3.

¹⁴ Transcript, Page 57, Lines 12-23.

¹⁵ This portion of Lodholz' deposition is Ex. 256, Page 191, Lines 3-20. It was read into the record at the hearing and may be found at Transcript, Pages 95-96, Lines 10-25, 1.

¹⁶ Transcript, Page 104, Lines 23-24.

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suggested that perhaps the person who replaced Lodholz as controller had discarded the documents when he took over Lodholz's office.¹⁷ Lodholz had left the employ of MPC and MGC on May 12, 2006.¹⁸

In its motion for sanctions, Staff accused Ries, or someone acting at his direction, of having deliberately destroyed the original invoices from 2003, 2004, and 2005. In response to Staff's motion for sanctions, MPC and MGC filed affidavits from Ries, Michael Mertz (Controller), David Wallen (V.P. Operations), and Patty Hawkins (Office Manager). All the affidavits indicated that the documents described by Lodholz in his deposition were only billing summaries, not the complete invoices sought by Staff. Each affiant also denied having destroyed any of Lodholz's documents after Lodholz left the company on May 12, 2006.¹⁹

At the hearing, MPC and MGC introduced an affidavit from Lodholz, which was admitted into evidence over the objection of Staff.²⁰ In his affidavit, Lodholz explained that the documents he referred to in his deposition were not the front page of the actual invoices. Instead, he had retained "a one page summary sheet for each month showing a list of the pipeline customers, the volume of gas delivered, the dollar charge by each of MPC and MGC, as well as the total aggregate charge to each customer for that month."²¹ The summary sheets described by Lodholz are included with the affidavit as Exhibit 311. No party called Lodholz to testify at the hearing.

Based on the evidence presented, Staff failed to prove its allegations that documents retained by Lodholz were destroyed to avoid disclosing them to Staff. It appears that the documents described by Lodholz in his deposition, as clarified in his affidavit, were turned over to Staff. No monetary sanction for destruction of documents is appropriate. However, the adverse evidentiary inference sought by Staff requires scrutiny.

¹⁷ Transcript, Page 107, Lines 3-14.

¹⁸ Transcript, Page 109, Lines 2-3.

¹⁹ The four affidavits are Ex. 258.

²⁰ The Lodholz affidavit is Ex. 311. One of Staff's objections to the admission of the Lodholz affidavit was that the affidavit did not include a date indicating when it was executed. Approximately a month after the hearing, on January 16, 2007, MPC and MGC filed a re-executed affidavit from Lodholz that indicates it was signed on January 12, 2007. MPC and MGC filed an accompanying motion asking the Commission to substitute the re-executed affidavit for the originally admitted Exhibit 311. Staff opposed that motion. There is no basis for supplementing or substituting a new affidavit for the document previously admitted as Exhibit 311. MPC and MGC's motion will be denied.

²¹ Ex. 311.

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The Commission is troubled by MPC and MGC's failure to provide Staff with even recreated invoices for 2003. Section 393.140(4), RSMo 2000, and Commission Rule 4 CSR 240-10.010 require public utilities to maintain their vital records and to make those records available to the Commission for review. However, MPC and MGC claim that to provide Staff with copies of invoices sent to customers in 2003 would be unduly burdensome. This is not a question of retaining documents in electronic form rather than paper. It is certainly reasonable to dispose of paper and instead keep important documents in an electronic database. That is how the Commission retains its own files. However, it is unbelievable that MPC and MGC would produce invoices, mail those invoices to customers, and then fail to retain either a paper or electronic copy of such invoices in a readily accessible form.

Staff did not prove that MPC and MGC deliberately destroyed those invoices, although that possibility is consistent with the circumstances. Staff certainly established that MPC and MGC's inability to produce original or electronic copies of customer invoices was very unusual.²² Furthermore, Staff established that it had great difficulty obtaining needed documentation from MPC and MGC throughout its investigation.²³

While Staff did not prove that the invoices were deliberately destroyed, the circumstances do establish that MPC and MGC were at least grossly incompetent in their retention of important records. Because of MPC and MGC's failure to maintain proper records for 2003, Staff was denied the evidence it needs to firmly establish the transportation rates charged to shippers on MPC and MGC's pipelines in 2003. The Commission will allow Staff to infer those rates, consistent with other evidence presented, as explained later in this Report and Order.

Regulation by the FERC

On June 28, 2006, Missouri Interstate Gas, along with MPC and MGC filed an application with the Federal Energy Regulatory Commission for authority to reorganize themselves to be reconstituted as an interstate pipeline, subject to the exclusive jurisdiction of the FERC. On April 20, 2007, the FERC issued an order granting that application and issuing federal certificates to the reorganized interstate pipeline.²⁴ Staff and other parties have sought rehearing of the FERC's decision, but, if the FERC's order stands, MPC and MGC will no longer be subject to regulation by this Commission.

²² Transcript, Page 62, Lines 15-18.

²³ Transcript, Pages 125-126, Lines 20-25, 1-5.

²⁴ FERC Docket No. CP06-407-000, et. al.

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However, this case is not moot because Staff's complaint alleges MPC and MGC violated their tariffs at a time when those companies were undeniably subject to regulation by this Commission. Therefore, the Commission will render a decision on Staff's complaint.

The Allegations of Staff's Complaint

Count 1

Findings of Fact

The first count of Staff's Complaint alleges that MPC and MGC failed to maintain separate facilities and personnel from Omega, as a marketing entity, thereby violating their own tariffs. In doing so MPC and MGC also failed to abide by the Commission's regulation regarding affiliate transactions.

David Ries is president of MPC and MGC. In addition, he was president of Omega until it was sold on June 1, 2006.²⁵ Staff alleges Ries used his position as the head of these companies to negotiate arrangements between the companies in a way that favored Omega over other companies that were shipping gas on the MPC and MGC pipelines. Staff alleges that, acting through Ries, MPC and MGC failed to apply their tariff terms, conditions, and requirements in a uniform and non-discriminatory manner to non-affiliated shippers. In particular, Staff alleges that MPC and MGC improperly shared confidential information with Omega, failed to require Omega to balance its gas shipments on the pipelines, while requiring all other shippers to do so, and allowed Omega to take possession of and sell lost and unaccounted for gas that accumulated on the pipeline.

The tariffs of MPC and MGC provide that MPC and MGC share office space with its affiliates, which would include Omega. However, those tariffs also indicate that MPC and MGC, as transporters of gas, maintain "separate operational facilities and personnel" from their affiliates. The tariffs also promise that "operational and accounting information is confidentially maintained by Transporter."²⁶

The evidence demonstrates that, as president of MPC, MGC, and Omega, Ries was given daily access to information that could benefit Omega in its role as a marketing agent. Staff submitted a sample of the daily reports Ries received as Exhibit 21. As described by Staff's witness, Robert Schallenberg, that daily report contains:

information regarding the shippers, all the shippers on the pipeline. It identifies their agent or when they're acting as

²⁵ Transcript, Page 509, Lines 3-14.

²⁶ Ex. 70, MGC's tariff, P.S.C. Mo. No. 2, Sheet No. 39; and Ex. 71, MPC's tariff, P.S.C. Mo. No. 3, Sheet 39.

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their own agent. It identifies their contract number to the extent this is one for its shipments. And then it tells you what its current status is regarding the gas that's brought into the system on the day and the in balance [imbalance]. And then it shows cumulative information.²⁷

That same information was not shared with other shippers on the pipelines, including other entities that were acting as marketing agents in competition with Omega.²⁸ Having access to that sort of information provided Omega with a competitive advantage over the other marketing agents who shipped gas on MPC and MGC allowing Omega access to market information and price information of competitors, other shippers could not access.²⁹ In a game of cards it would be like one player being able to see the cards of others at the table.

MPC and MGC do not deny that as president of Omega, Mr. Ries had access to the same information about the operations of the pipelines that he could access as president of MPC and MGC. Instead, in their defense, MPC and MGC argue that the Commission's Staff has long been aware of the affiliate relationship and shared employees and officers between Omega and MPC and MGC, and did not raise any objection to that relationship until it filed this complaint.

MPC and MGC explain that they wanted to provide a bundled service to some small customers of the pipelines and were looking for a way to do that consistent with their tariffs.³⁰ However, those tariffs do not allow them to buy or sell gas; they are only allowed to operate as transporters of gas. On August 23, 2002, Ries contacted Staff by e-mail and indicated MPC and MGC were considering either the revision of its tariffs to allow for the sale of gas to customers, or as an alternative, the use of Omega to provide a marketing service to customers along the path of the pipelines.³¹ Staff responded to Ries' proposals in a letter dated January 3, 2003.³²

MPC and MGC contend that Staff's letter indicates Staff knew of and approved the plan to use Omega as a marketing affiliate.³³ In

²⁷ Transcript, Page 293, Lines 13-20.

²⁸ Transcript, Page 265, lines 1-3.

²⁹ Transcript, Page 278, Lines 10-20.

³⁰ Transcript, Page 574, Lines 2-19.

³¹ Ex. 310.

³² Ex. 308.

³³ Transcript, Page 593, Lines 14-22.

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particular, MPC and MGC point to one sentence of that letter that states, "In previous conversations, Staff has expressed concern over the structure of these transactions and Staff's preference that an affiliate should make any 'bundling' arrangements."³⁴ From that sentence, MPC and MGC contend Staff knew of and approved their plan to use Omega to market gas.

That interpretation is not, however, supported by the rest of the Staff's letter. The next sentence of the letter states:

Even if an affiliate engages in these transactions, however, Staff has concerns that separation between regulated and unregulated operations will not exist due to the structure of MPC, MGC, MIG, and Omega.

Clearly, in 2003, Staff had concerns about the improper sharing of information between MPC and MGC and a marketing affiliate. It is precisely those concerns that Staff brought to the Commission's attention in this complaint. Thus, the January 3, 2003, letter cannot reasonably be interpreted as indicating Staff's approval of the use of Omega as a marketing affiliate of MPC and MGC.

Even if Staff had fully approved MPC and MGC's use of Omega as a marketing affiliate, that approval would not absolve MPC and MGC of their duty to comply with the requirements of their tariffs. Those tariffs require MPC and MGC, while acting as transporters of gas, to maintain the confidentiality of operational and accounting information. Instead, they shared that information with Omega through the shared presidency of David Ries.

As further support for Count I, Staff contends that MPC and MGC gave special preference to Omega when they did not require Omega to balance its daily use of pipeline capacity. Omega, in its role as a local distribution company supplying gas to Fort Leonard Wood, as well as in its role as a gas marketer for other customers, shipped gas on the pipeline system. The tariffs of MPC and MGC require a shipper on the system to balance the amount of gas it puts into the pipeline with the amount of gas it takes out each day, within a ten percent tolerance range.³⁵ AmerenUE, another shipper on the pipelines, was required to comply with this requirement.³⁶ MPC and MGC did not require Omega to balance its nomination and usage of gas supplies. On many days, Omega did not nominate any gas into the pipeline, while continuing to deliver gas to its

³⁴ Ex. 308.

³⁵ Exhibits 70 and 71.

³⁶ Transcript, Page 266, Lines 1-22.

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customers at the other end of the pipeline.³⁷ As would be expected, Omega accumulated a substantial imbalance while it was affiliated with MPC and MGC.³⁸

MPC and MGC agree that Omega was not required to balance its gas nominations and usage. However, they contend that by undertaking to balance the overall gas flows on the pipeline system, Omega was performing a valuable service that benefited the pipeline companies and ultimately their other customers.

MPC and MGC explain that pipeline imbalances result from the difference between the volume of gas that a shipper or its agent nominates from the interstate delivering pipeline, and the volume of gas actually used by the shipper. For MPC and MGC, the delivering pipelines are Panhandle Eastern Pipeline Company (PEPL) and Mississippi River Transmission (MRT). A shipper contracts with PEPL or MRT to deliver a certain amount of gas into the MPC and MGC pipeline system. The shipper then uses a certain amount of gas from the MPC and MGC pipeline system at the other end. To the extent the amount of gas used by the shipper differs from the amount put into the pipeline from the interstate pipeline, the MPC and MGC pipeline system is out of balance.

MPC and MGC are gas transporters, not gas merchants, and their tariffs do not allow them to buy or sell gas for any reason.³⁹ As a result, MPC and MGC cannot buy or sell gas off their pipelines to balance the system if the shippers bring too much, or too little, gas into the system. MPC and MGC argue that they used their affiliate, Omega, to balance the system. The pipelines suggest that Omega would reduce its nominations when there was otherwise too much gas in the system, and increase its nominations if other shippers nominated too little gas.⁴⁰

However, there were generally excess amounts of gas in the pipeline system. The real objective of this scheme, as will be explained, was that Omega was able to extract unregulated profits by selling that accumulated gas to its customers. Through the use of inside information, Omega appears to have also acquired access to additional gas at no cost.

The transportation contracts that MPC and MGC enter into with the various shippers allow the pipelines to retain a certain percentage of the

³⁷ Ex. 21HC is a sample imbalance summary for a particular date showing the imbalance sustained by Omega and its customers, compared to non-affiliated shippers on the pipeline system.

³⁸ Transcript, Page 548, Lines 1-14. The exact numbers are highly confidential.

³⁹ Ries Rebuttal, Ex. 304, Page 9, Lines 18-19.

⁴⁰ Ries Rebuttal, Ex. 304, Page 12, Lines 10-13.

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nominated gas as gas lost or unaccounted for during the transportation process.⁴¹ For example, MPC and MGC's contract with AmerenUE, which is a shipper on the pipelines, required AmerenUE to nominate at various times an extra .43 to .50 percent when shipping gas through the pipeline to compensate for lost and unaccounted for gas.⁴² The amount of gas nominated to compensate for lost and unaccounted for gas can vary from contract to contract depending upon the needs of the system and the negotiating position of the parties.⁴³

Some gas is inevitably lost while it is being transported through the pipeline, but to the extent the gas lost is less than the extra nomination required by the contract, lost and unaccounted for gas can accumulate on the system. There was testimony that the extra gas on the system belongs to the pipeline company.⁴⁴ However the contracts governing lost and unaccounted for gas were not introduced into evidence. While title to the gas was not clearly established in this case, MPC and MGC's tariffs do not allow them to sell gas for any reason. To get around that problem, MPC and MGC allowed its marketing affiliate, Omega, to under-nominate the amount of gas it put into the pipeline. Omega was then able to deliver more gas to its marketing customers than it put into the system, while collecting payment from the customers for all the gas it delivered. In effect, Omega was thereby able to sell that lost and unaccounted for gas to its marketing customers, with the proceeds ultimately flowing back to the owners of MPC, MGC, and Omega.

This arrangement clearly provides an advantage to Omega as it competes with other marketers to provide service to customers along the length of the pipeline. It may have also resulted in harm to other entities doing business with the pipeline if MPC and MGC had an obligation to notify those entities that the estimated percent of lost and unaccounted for gas was higher than that experienced or to adjust the estimate downward.

The advantage MPC and MGC gave to their affiliate is increased by the inappropriate sharing of confidential information, and explains the likely reason that information was shared. Since David Ries, as President of Omega, had full access to the confidential records of MPC and MGC, he knew exactly how much gas other shippers were nominating for shipment through the pipeline. With that knowledge, he also knew how much extra

⁴¹ Transcript, Page 531, Lines 17-22.

⁴² Transcript, Page 269, Lines 15-17.

⁴³ Transcript, Page 270, Lines 6-11.

⁴⁴ Transcript, Page 270, Lines 20-25.

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lost and unaccounted for gas would be available for Omega to sell to its customers.

Because Omega was not required to balance its gas nominations and usage, it accumulated an imbalance of more than \$1 million worth of gas.⁴⁵ So long as Omega was owned by the same people that owned MPC and MGC, that imbalance represented additional unregulated profit that could be hidden from regulators charged with examining MPC and MGC's income to set the rates they could charge their customers. It also provided significant advantage to Omega in competing with other entities.

Conclusions of Law

1. Section 12.b of the General Terms and Conditions of the tariffs issued by MPC and MGC provides:

For efficiency purposes, Transporter occupies office space on the same floor as its affiliates, but maintains separate operational facilities and personnel. Operational and accounting information is confidentially maintained by Transporter.⁴⁶

2. Section 2.b of the General Terms and Conditions of the tariffs issued by MPC and MGC provides in relevant part: "If, due to operating conditions, the quantities of gas received and delivered are not in balance on any one particular day, such imbalance shall be corrected as promptly as is consistent with operating conditions."⁴⁷ This section of the tariff requires all shippers on the pipeline to balance the gas they put into the pipeline with the gas they take out on a daily basis.

3. The Commission's Affiliate Transaction rule for gas utilities, 4 CSR 240-40.015(1)(A), defines an affiliated entity as "any person, including a ... corporation ... which directly or indirectly, through one (1) or more intermediaries, controls, is controlled by, or is under common control with the regulated gas corporation." Until it was sold on June 1, 2006, Omega met the definition of an entity affiliated with MPC and MGC.

4. Commission Rule 4 CSR 240—40.015(2) provides:

(A) A regulated gas corporation shall not provide a financial advantage to an affiliated entity. For purposes of this rule, a regulated gas corporation shall be deemed to provide a financial advantage to an affiliated entity if-

1. It compensates an affiliated entity for goods or services above the lesser of-

⁴⁵ Transcript, Page 548, Lines 10-14.

⁴⁶ Exhibits 70 and 71, Tariff Sheet No. 39.

⁴⁷ Exhibits 70 and 71, Tariff Sheet No. 26.

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- A. The fair market price; or
- B. The fully distributed cost to the regulated gas corporation to provide the goods or services for itself; or
- 2. It transfers information, assets, goods or services of any kind to an affiliated entity below the greater of-

- A. The fair market price; or
- B. The fully distributed cost to the regulated gas corporation.
- (B) Except as necessary to provide corporate support functions, the regulated gas corporation shall conduct its business in such a way as not to provide any preferential service, information or treatment to an affiliated entity over another party at any time.

5. MPC and MGC violated Commission Rule 4 CSR 240-40.15(2)(B)'s prohibition on affiliate transactions in that:

A) MPC and MGC provided preferential service information and or treatment:

- 1) By sharing confidential pipeline operations information with Omega;
- 2) By not requiring Omega to operate in balance within the parameters of its tariffs while requiring all other entities to do so; and
- 3) By allowing Omega to sell lost and unaccounted for gas.

B) MPC and MGC, violated provisions of Commission Rule 4 CSR 240-40.15(2)(A) by transferring gas to Omega at a price lower than the greater of fair market price or cost.

Decision

Did MPC and MGC violate the terms of their tariffs and Commission affiliate transactions rules (4 CSR 240-40.016) by permitting Omega Pipeline Company to use confidential customer information in a discriminatory manner for each of Omega's contracts with customers served by MPC and MGC and by allowing gas to be transferred to Omega at an amount lower than the greater of full market value or cost.

The evidence shows that MPC and MGC operated in a manner that gave their marketing affiliate, Omega, complete access to what should have been confidential information about the natural gas nominations made by

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and actual gas used by other shippers on the pipeline. Access to that information allowed Omega to adjust its own gas nominations to avoid the need to nominate any gas on many days. This allowed Omega to profit from the sale of lost and unaccounted for gas. With such inside information and preferential treatment, Omega had an unfair advantage in competing for customers. The improper sharing of confidential information violated the terms of MPC and MGC's tariffs. The improper transfer of utility assets to an affiliate without consideration violated the Commission's affiliate transactions rule. Allowing Omega to operate in violation of its tariff requirements for imbalance provided Omega with preferential treatment.

MPC and MGC did not maintain separate operational facilities or personnel from Omega, in its role as an affiliated marketing entity. Beginning in 2003, David Ries was part-owner and president of MPC and MGC, as well as Omega. Ries negotiated gas sales and transportation arrangements with municipalities and other end-users for Omega, and then determined the MPC and MGC transportation arrangements that would apply to the Omega gas transactions. In his role with MPC and MGC, Ries gained inside knowledge of pipeline information such as pipeline gas imbalances, lost and unaccounted for gas levels, actual daily gas demand, and information about other shippers that is not available to any other shipper on the MPC and MGC pipeline system. Ries used this information to enter into transportation arrangements that were advantageous to Omega. Those advantageous arrangements were not made available to other shippers. Staff proved Count I of its complaint.

Count II

Findings of Fact

The second count of Staff's complaint alleges that MPC and MGC violated their tariffs by transporting gas to certain customers without obtaining a signed transportation agreement with those customers. The customers in question are G-P Gypsum Corporation and Willard Asphalt Paving, Inc., two large industrial users of natural gas, located along the pipeline route.

As explained more fully in the Conclusions of Law section of the Report and Order, MPC and MGC's tariffs state that the companies will provide gas transportation service to shippers who have executed a transportation agreement.⁴⁸ MPC and MGC transported gas to meet the needs of the two industrial customers, but never entered into a Transportation Agreement with either of them. MPC and MGC

⁴⁸ Imhoff Direct, Ex. 1, Page 5, Lines 2-4.

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acknowledge transporting gas to serve these customers, but contend that no transportation agreement was necessary because the gas supplied to those customers was transported under the terms of a transportation agreement with the City of Cuba.

The City of Cuba has had valid Transportation Agreements with MPC⁴⁹ and MGC⁵⁰ since at least July 1, 1999, a date before MPC and MGC were purchased by their current owners. Beginning on July 1, 2003, Omega entered into a marketing agreement with Cuba.⁵¹ Subsequently, Omega entered into separate marketing agreements with the two industrial customers.⁵² These marketing agreements are the basis for MPC and MGC's argument that it can transport gas to G-P Gypsum and Willard Asphalt without a separate transportation agreement.

Gas marketing agreements are common in the natural gas industry. Under such an agreement, a relatively small municipal gas system or industrial customer hires an experienced gas marketer to purchase their gas supply, administer contracts, and monitor the nomination process to transport the gas to their customers.⁵³ The field of gas marketing is competitive and is not regulated by this Commission. Indeed, other gas marketers currently provide service to other small towns along the MPC and MGC pipelines,⁵⁴ and such towns do not have separate transportation agreements with the pipeline.⁵⁵

In general, there is nothing wrong with gas marketing agreements. Such agreements only become problematic when the gas marketer is in an affiliate relationship with a pipeline company. The problem is, such a gas marketing agreement by an affiliate of a pipeline utility allows the utility to hide transportation discounts given to an unregulated marketing affiliate. A pipeline utility negotiating a transportation agreement with a gas marketing affiliate has a strong incentive to slash its transportation rates for an affiliate, since the money ultimately ends up in the same pocket.

The unregulated gas marketing affiliate that receives the benefit of reduced transportation rates can offer a portion of those saving to prospective customers, thereby gaining a competitive advantage over other gas marketers seeking to serve the same customers. Meanwhile, the

⁴⁹ Cuba's Transportation Agreement with MPC is Ex. 23HC.

⁵⁰ Cuba's Transportation Agreement with MGC is Ex. 24HC.

⁵¹ Omega's marketing contract with Cuba is Appendix I to Ries Rebuttal, Ex. 304.

⁵² Omega's marketing contract with G-P Gypsum took effect on August 1, 2003, and is Ex. 32.

⁵³ Omega's marketing contract with Willard Asphalt took effect on April 1, 2004 and is Ex. 33.

⁵⁴ Smith Rebuttal, Ex. 303, Page 10, Lines 14-22.

⁵⁵ Smith Rebuttal, Ex. 303, Page 11, Lines 16-21.

⁵⁶ Ries Rebuttal, Ex. 304, Page 18, Lines 14-23.

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utility's regulated rates will be based, in part, on the income earned by the utility. To the extent that the regulated utility's income from providing transportation is transferred to an unregulated affiliate, the regulated rates of the utility will need to be increased. Ultimately, the customers served by the utility could be required to pay the cost of the transportation discounts given to the marketing affiliate.

MPC and MGC's tariff states that transportation services are to be provided to any shipper who enters into a transportation agreement. The tariffs do not define "shipper," and MPC and MGC would circularly define a "shipper" simply as someone who has entered into a transportation agreement. By their definition, a gas customer who receives deliveries of gas under some other customer's transportation agreement is not a "shipper" and does not need to enter into a transportation agreement. That definition makes sense in the context of an unaffiliated gas marketer, but it does nothing to prevent the previously described affiliate abuse problem.

Staff would apply a definition of "shipper" taken from the Commission's marketing affiliate transaction rule, 4 CSR 240-40.016(1)(M). That section defines "shipper" to include "all current and potential transportation customers on a regulated gas corporation's natural gas distribution system." If that definition were applied to MPC and MGC's tariffs, then Staff would read the tariff as limiting the provision of transportation service to those end-use customers who have entered into a transportation agreement. The consistent application of Staff's definition to the tariffs would also, effectively bar all gas marketers, unaffiliated as well as affiliated, from the MPC and MGC pipelines unless the marketer's customers enter into a separate transportation agreement with the pipelines.

Conclusions of Law

1. MPC and MGC's tariffs contain two provisions that define when transportation service is to be available to any shipper. For Firm Provisional Transportation Service, the clause is found in Section 1, Tariff Sheet No. 4. For Interruptible Provisional Transportation Service, the clause is found in Section 1, Tariff Sheet No. 15. Both tariff sheets state in relevant part as follows:

1. . . . Such transportation service shall be available for any Shipper:

...

c. which has executed a Transportation Agreement wherein Transporter has agreed to transport natural gas

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for Shipper's account up to a specific maximum daily transportation volume. . . .

2. The definition section of the Commission's Marketing Affiliate Transactions Rule states: "Shippers means all current and potential transportation customers on a regulated gas corporation's natural gas distribution system."⁵⁶ Although it could have done so, the Commission did not include a provision in the Marketing Affiliate Transactions Rule requiring all shippers - defined as all current and potential transportation customers - on a pipeline to execute a separate transportation agreement before receiving natural gas delivered through the pipeline.

Decision

Did MPC and MGC violate their tariffs by transporting natural gas to certain Omega customers without an executed transportation agreement?

Staff would interpret MPC and MGC's tariff as requiring every current or potential transportation customer who receives natural gas delivered through the pipeline to have executed a transportation agreement. Staff would then seek penalties against MPC and MGC for having violated this interpretation of their tariff.

Staff's interpretation of the tariff is not consistent with industry practice in that customers of non-affiliated gas marketers generally do not need to have a separate shipping agreement with the pipeline. Indeed, Staff does not attempt to apply such an interpretation to natural gas deliveries to customers through gas marketers not affiliated with MPC and MGC. Staff bases its interpretation on a definition of shipper taken from the context of the Commission's Marketing Affiliate Transactions Rule, but does not offer a consistent basis for applying that definition outside the confines of that narrow rule.

Staff describes a legitimate concern about abuse of the affiliate relationship engendered by the concealment of transportation discounts given to a gas marketing affiliate. The Commission will address that concern again in a broader context in Count III of Staff's complaint. However, within the narrower parameters of Count II of Staff's complaint, the Commission must find that the language of MPC and MGC's tariff's do not require every current or potential transportation customer who receives natural gas delivered through the pipeline to have executed a transportation agreement. MPC and MGC did not violate that provision of their tariffs by

⁵⁶ Commission Rule 4 CSR 240-40.016(1)(M).

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transporting gas to such customers, and relief on Count II of Staff's complaint will be denied.

Count III

Findings of Fact

The third count of Staff's complaint alleges MPC and MGC offered certain transportation discounts to Omega, at a time when Omega was an affiliated company. MPC and MGC's tariffs provide that "the lowest transportation rate charged to an affiliate shall be the maximum rate that can be charged to non-affiliates."⁵⁷ Staff claims the discounts MPC and MGC gave to Omega set a new lower standard for the amount MPC and MGC could charge non-affiliated companies for transportation service. Staff asks the Commission to adjust MPC and MGC's rates accordingly.

When evaluating Staff's claim, the Commission must determine whether MPC and MGC gave a discount to Omega. While it was affiliated with MPC and MGC, Omega operated in two roles. Initially, beginning in 1992, long before the companies were purchased by their current owners, Omega owned the natural gas distribution system on the federal enclave of Fort Leonard Wood, and sold gas to the Fort under a marketing contract. In that role, Omega entered into a transportation agreement with MPC and MGC to transport natural gas to Fort Leonard Wood.⁵⁸ At that time, MPC, MGC, and Omega were owned by Utilicorp, n/k/a Aquila. Omega's marketing contract with Fort Leonard Wood expired on September 30, 2002, and Omega did not sell gas to the Fort from October 1, 2002, through January 31, 2005. Omega regained the contract with the Fort on February 1, 2005, and once again transports gas through the pipelines for sale to the Fort.⁵⁹

Omega's other role began on July 1, 2003, when its Natural Gas Sales and Agency Agreement with the City of Cuba went into effect.⁶⁰ Under that agreement, Cuba agreed to pay Omega "a fixed fee of . . . per Dth of Gas delivered to reimburse Seller [Omega] for all transportation fees (reservation and commodity) incurred by Seller on all upstream pipelines to transport said Gas purchased hereunder to the Delivery Point [the Cuba City Gate]."⁶¹ That contract also appointed Omega as Cuba's agent to "nominate and administer the transportation of natural gas and pay the monthly invoices for the transportation services provided by MPC and MGC,

⁵⁷ Tariff Sheet No. 6, Section 3.2b(1), Exhibits 70 and 71.

⁵⁸ Ries Rebuttal, Ex. 304, Page 6, Lines 5-11.

⁵⁹ Id. at Page 6, Lines 12-17.

⁶⁰ Ex. 22.

⁶¹ Id. The amount of the fixed fee is highly confidential.

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and any other third party transporter, exclusive of the fuel charge.” The contract required Cuba to reimburse Omega for the actual cost of the gas purchased under the contract. The gas that Omega purchased on behalf of Cuba was moved through the pipelines using the capacity reserved by Cuba under the 1999 Transportation Agreements between Cuba and MPC⁶² and MGC.⁶³ By entering into this sales and agency agreement with Cuba, Omega became an affiliated gas marketer.

Before July 1, 2003, MPC and MGC charged the maximum tariff rates for transportation service for all shippers as shown in the following chart:⁶⁴

Transportation Type/ Delivery Points	Firm	Firm	Interruptible
	Reservation per MDQ	Commodity Per Dt.	Commodity Per Dt.
MPC Delivery	\$4.3181	\$.1699	\$.3036
MGC Delivery Except the Fort	\$13.1766	\$.9433	\$1.3765
MGC Delivery to the Fort	\$18.10	\$.55	\$1.15

After July 1, 2003, MGC began charging Omega a reduced commodity charge of \$.20 for delivering gas to Cuba. That rate is demonstrated by recreated invoices supplied by MGC. Specifically, Exhibit 67-E, which is comprised of recreated invoices for services beginning in January 2004, shows a commodity charge of \$.20 for contract number MG-1009-TAF. That contract number is the Transportation Agreement with Cuba as shown in Exhibit 24.

The recreated invoices in evidence only go back to January 2004, MPC and MGC refused to produce such invoices for 2003.⁶⁵ For reasons previously explained in detail in its discussion of Staff’s motion for sanctions for destruction of documents, the Commission will infer that if such invoices were available, they would show that Omega began receiving the discount on July 1, 2003.

In their defense, MPC and MGC contend they gave the transportation discount to the City of Cuba and not to Omega. Obviously,

⁶² Ex. 23.

⁶³ Ex. 24.

⁶⁴ The chart is taken from Schallenberg Direct, Ex. 19, Page 24, Lines 4-11.

⁶⁵ Transcript, Page 92, Lines 20-22.

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the City of Cuba is not affiliated with MPC and MGC, so a discount given to Cuba would not need to be extended to non-affiliated shippers.

In support of their contention that the discount was given to the City of Cuba, MPC and MGC point to a letter from David Ries, as President of MPC, to the Mayor of Cuba, dated July 7, 2003.⁶⁶ The letter purports to memorialize a previous discussion in which MPC agrees to give Cuba a discounted commodity rate. However, unlike other letters from Ries purporting to memorialize discussions with municipalities about discounts, the July 7, 2003, letter to Cuba does not contain a signature from the recipient accepting and agreeing to the modification. Unlike those letters, the July 7, 2003, letter is not even formatted to contain such a signature.⁶⁷ These inconsistencies lead to the conclusion that Exhibit 26 was created after the fact to bolster MPC and MGC's position.

MPC and MGC also contend Omega was merely acting as an agent for Cuba in purchasing natural gas for the city and then transporting that gas to Cuba using the city's transportation agreement with the pipelines. However, that transportation agreement, which has been in effect since 1999, before MPC and MGC were purchased by their current owners, requires Cuba to pay full tariff rates to transport gas on the pipelines.⁶⁸ The sales and agency agreement between Cuba and Omega requires Cuba to pay a fixed fee to reimburse Omega for the cost of transporting gas through the pipelines.⁶⁹ The invoices, which show the amount Omega was actually billed for the transportation of gas to Cuba, allowed Staff to discover the discounted commodity charge that was given to Omega. In sum, Omega was charging Cuba the transportation costs set in the sales and agency agreement, while paying MPC and MGC the discounted commodity charge identified by Staff. Omega kept the difference as extra profit.

Furthermore, MPC and MGC point out that the gas moved to the other Omega customers, G-P Gypsum and Willard Asphalt, was moved using the pipeline capacity of Cuba. They suggest that somehow that fact means that the transportation discounts they offered were made to a non-affiliated shipper. However, Omega's marketing contract with Cuba did not give it any authority to use Cuba's pipeline capacity to deliver gas to other customers. MPC and MGC's tariffs did not contain any provisions that

⁶⁶ Ex. 26.

⁶⁷ For comparison see Ex. 25, an August 9, 2002 letter to Cuba; Ex. 27, an April 12, 2006, letter to the City of Waynesville; and Ex. 28, a December 18, 2002 letter to Waynesville.

⁶⁸ Exhibits 23 and 24.

⁶⁹ Ries Rebuttal, Ex. 304, Appendix I.

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would allow Cuba to release its capacity for the use of other shippers.⁷⁰ Ries, testifying on behalf of MPC and MGC conceded that Cuba likely did not even know that its capacity was being used in this manner.⁷¹

As MPC and MGC explain, there would be nothing wrong with this arrangement if Omega was not an affiliate of MPC and MGC. As an unregulated gas marketer, Omega is free to make a profit by marking up charges for elements of the bundled marketing services it provides to Cuba, and other shippers. Generally if a gas marketer can negotiate a better deal with the pipelines, it is welcome to keep the difference between what it pays the pipeline and what it collects from its customer as profit generated by its skills as a negotiator.

However, Omega was an affiliate of MPC and MGC. David Ries was President of both Omega and the pipeline companies. Therefore, he was on both sides of the negotiation and was in a position to grant himself a shipping discount. By giving the unregulated affiliate, Omega, a shipping discount, Ries could transfer income from the regulated utilities to the unregulated affiliate. Subsequently, in any future rate case, the regulated utilities would be in a position to justify charging higher rates to their captive customers. Furthermore, the increased profit made possible by the discounted transportation rates, would allow Omega to offer a better deal to the municipalities and other shippers to whom it was offering its marketing services, thereby gaining a competitive advantage. It is exactly this sort of affiliate abuse that MPC and MGC's tariff is seeking to prevent when it requires that shipping discounts given to an affiliate also be passed on to non-affiliates.

In their defense, MPC and MGC argue that Omega has consistently paid the highest rates of any shipper on the Pipelines' systems. In support of this claim, MPC and MGC offered the testimony of Christopher John, a former technical advisor at the FERC. John presented calculations, based on the 25 percent load factor specified in the tariff, which combined the reservation and commodity rates into a single volumetric transportation rate. His calculations show that from February 2005 through March 2006, Omega was charged a combined transportation rate of \$2.6803/Dth, which was the highest transportation rate on the system.⁷²

The principle flaw in John's argument is that his calculation reflects the transportation rate paid by Omega under the contract between MGC and Omega for transportation of gas to Fort Leonard Wood. It does not

⁷⁰ Transcript, Page 650, Lines 12-16.

⁷¹ Transcript, Page 651, Lines 12-16.

⁷² John Rebuttal, Ex. 300, Page 26, Table beginning at Line 12.

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reflect the rates Omega paid to transport gas to customers other than Fort Leonard Wood. Since Fort Leonard Wood is located at the terminal end of the MGC pipeline, it is to be expected that Omega would be charged the highest rates of any shipper for transporting gas to the end of the pipeline. In contrast, the recreated invoices contained in Exhibit 67, Appendix E, show that when transporting gas to the City of Cuba, Omega was charged a combined volumetric transportation rate of \$1.9328/Dth, which was the lowest rate on the pipeline system.

As of July 1, 2003, the lowest rates MPC and MGC were charging Omega, an affiliated shipper, are shown in the following chart:⁷³

Transportation Type/ Delivery Points	Firm	Firm	Interruptible
	Reservation per MDQ	Commodity Per Dt.	Commodity Per Dt.
MPC Delivery	\$4.3181	\$.1699	\$.3036
MGC Delivery Except the Fort	\$13.1766	\$.20	\$1.3765
MGC Delivery to the Fort	\$18.10	\$.55	\$1.15

The previously discussed discount was just the first given by MPC and MGC to Omega. On September 1, 2003, MPC and MGC began providing discounted interruptible transportation service to Omega to allow Omega to provide bundled natural gas service to G-P Gypsum.⁷⁴ Subsequently, Omega entered into a similar agreement with Willard Asphalt Paving, Inc., effective April 1, 2004.⁷⁵ At that time, Omega did not have a separate Transportation Agreement with MPC and MGC relating to its role as a gas marketer. Instead, it moved gas through the pipelines to G-P Gypsum and Willard Asphalt using Cuba's Transportation Agreements.

Exhibits 35 and 36 are recreated invoices that illustrate the rates Omega, as a marketing affiliate, was charged to transport gas for G-P Gypsum and Willard Asphalt. Rather than send a separate bill to Omega for each of its marketing customers, the pipeline charges are included on a

⁷³ The chart is taken from Schallenberg Direct, Ex. 19, Page 25, Line 1.

⁷⁴ Omega's Natural Gas Sales Agreement with G-P Gypsum is Ex. 32. The sales agreement states that it became effective on August 1, 2003, but it was not executed until August 19, 2003. Staff based its calculations on the assumption that the agreement became effective on September 1. The Commission will do the same.

⁷⁵ Omega's Natural Gas Sales Agreement with Willard Asphalt is Ex. 33.

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single bill, with detail that allowed Omega to determine the volumes delivered to each of its customers. Exhibits 35 and 36 show a total delivery of 11,077 Dths to three customers; 2,003 Dths were delivered to the Willard Asphalt interconnect, 5,565 Dths were delivered to the Cuba city gate on behalf of G-P Gypsum, and 3,509 Dths were delivered for use by the City of Cuba.

The invoice to Omega shows that the same commodity rates were charged for all volumes transported. Specifically, MPC and MGC charged Omega a MGC commodity rate of \$.20/Dth, and a MPC commodity rate of \$.1699/Dth. However, while the gas transported for Cuba was under firm transportation, the gas transported for G-P Gypsum was interruptible in nature,⁷⁶ as was that supplied to Willard Asphalt.⁷⁷ Thus, while the gas was delivered using the capacity reflected in the firm transportation contract between the pipelines and Cuba, the transportation service provided to G-P Gypsum and Willard Asphalt was actually interruptible. Since interruptible service does not provide for guaranteed capacity on the pipeline, there is no reservation charge. Therefore, the only charges reflected on the invoice for charges related to the transportation of gas to G-P Gypsum and Willard Asphalt is the MGC commodity rate of \$.20/Dth and the MPC commodity rate of \$.1699/Dth.

As of September 1, 2003, the lowest rates MPC and MGC were charging Omega, an affiliated shipper, are shown in the following chart:⁷⁸

Transportation Type/ Delivery Points	Firm	Firm	Interruptible
	Reservation per MDQ	Commodity Per Dt.	Commodity Per Dt.
MPC Delivery	\$4.3181	\$.1699	\$.1699
MGC Delivery Except the Fort	\$13.1766	\$.20	\$.20
MGC Delivery to the Fort	\$18.10	\$.55	\$1.15

On February 1, 2005, MGC began giving Omega an additional discount for the transportation of gas to Fort Leonard Wood. MGC's tariff establishes a maximum \$.55/Dth commodity charge for firm transportation

⁷⁶ Schallenberg Surrebuttal, Ex. 67, Page 9, Lines 9-13.

⁷⁷ Ex. 33.

⁷⁸ The chart is taken from Schallenberg Direct, Ex. 19, Page 25, Line 15.

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service to Fort Leonard Wood.⁷⁹ However, the invoices collected in Exhibit 67-D show that beginning on February 1, 2005, when Omega regained the contractual right to supply gas to the Fort, Omega was actually billed a commodity rate of \$.30/Dth for firm transportation service to Fort Leonard Wood.⁸⁰

As of February 1, 2005, the lowest rates MPC and MGC were charging Omega, an affiliated shipper, are shown in the following chart.⁸¹

Transportation Type/ Delivery Points	Firm	Firm	Interruptible
	Reservation per MDQ	Commodity Per Dt.	Commodity Per Dt.
MPC Delivery	\$4.3181	\$.1699	\$.1699
MGC Delivery Except the Fort	\$13.1766	\$.20	\$.20
MGC Delivery to the Fort	\$18.10	\$.30	\$1.15

On May 1, 2005, MPC and MGC gave an additional transportation discount to Omega for service provided to another bundled service customer. This time the customer was Emhart Glass Manufacturing, Inc. Omega had entered into a firm Natural Gas Sales Agreement with Emhart Glass beginning on December 1, 2004.⁸² This was a firm contract and thus would ordinarily include a reservation charge. However, beginning on May 1, 2005, the invoices do not include a reservation charge, indicating that MPC and MGC waived that reservation charge for Omega's delivery of gas to Emhart Glass. On May 1, 2005, MGC was still charging Omega the maximum commodity rate under its tariff. That changed as of June 1, 2005, when the commodity rate for gas transported to Emhart Glass was reduced to \$.30/Dth, the rate previously set for service to Fort Leonard Wood.⁸³

⁷⁹ Ex. 70, Tariff Sheet No. 5.

⁸⁰ The invoices collected in Ex. 67-D state on their face that they are for services provided beginning in February 2004. However, these are recreated invoices and they contain an incorrect date. Other evidence indicates Omega did not resume supplying gas to Fort Leonard Wood until February 2005, and MPC and MGC do not dispute the assertion that the dates on the recreated invoices are incorrect. Therefore, the Commission finds that the invoices in question are for the period after February 1, 2005.

⁸¹ The chart is taken from Schallenberg Direct, Ex. 19, Page 26, Line 5.

⁸² Ex. 45.

⁸³ Ex. 67-D, Appendix D-17.

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As of May 1, 2005, the lowest rates MPC and MGC were charging Omega, an affiliated shipper, are shown in the following chart:⁸⁴

Transportation Type/ Delivery Points	Firm	Firm	Interruptible
	Reservation per MDQ	Commodity Per Dt.	Commodity Per Dt.
MPC Delivery	\$0.00	\$.1699	\$.1699
MGC Delivery Except the Fort	\$0.00	\$.20	\$.20
MGC Delivery to the Fort	\$18.10	\$.30	\$1.15

Conclusions of Law

1. The Firm Provisional Transportation Service, and Interruptible Provisional Transportation sections of MPC and MGC's tariffs contain provisions indicating as follows:

3.2 Range of Rates

b. For all Transportation Agreements entered into by Transporter with any affiliate of Transporter after the effective date of tariff sheets having a Date of Issue of January 18, 1995, in those instances in which the term of the Agreement is greater than three (3) months:

(1) The lowest transportation rate charged to an affiliate shall be the maximum rate that can be charged to non-affiliates. Any renegotiation or other type of modification to the rates of any then-effective Transportation Agreement is to be considered an applicable Transportation Agreement for the purpose of setting this maximum rate for non-affiliates.

(2) Transporter will submit each such Transportation Agreement for

⁸⁴ The chart is taken from Schallenberg Direct, Ex. 19, Page 27, Line 1.

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Commission approval in those instances in which the rate offered to a non-affiliate is proposed to be greater than any rate offered to any affiliate.

(3) Transporter will submit a rate comparison for all Transportation Agreements.

(4) Rate comparisons for compliance with these provisions will be calculated assuming a 25% load factor.

(5) These provisions will be applied to the Transporter's service area and the service area of Missouri Pipeline Company [Missouri Gas Company] as separate entities and on a separate basis.

c. If at some point in time the Staff of the Commission determines that the provisions of Section 3.2(b) and Section 12(c) of the General Terms and Conditions are not effective in preventing rate discrimination to non-affiliates, after contacting Transporter, the Staff may file a notice to that effect with the Commission. As a consequence, on the date of such notice filing, said provisions will be terminated and at that point in time the following provisions will automatically replace Section 3.2(b) and Section 12(c) of the General Terms and Conditions with regard to all Transportation Agreements in effect at the time of Staff's filing of said notice with the Commission:

The transportation rate charged to any affiliate on the Transporter's pipeline pursuant to a Transportation Agreement for a term greater than three (3) months entered into after January 5, 1995 shall be the maximum

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rate which may be charged to
non-affiliates.⁸⁵

From July 1, 2003, when MPC and MGC offered their first transportation rate discount to Omega, until June 1, 2006, when Omega was sold to an unaffiliated entity, Omega was affiliated with the pipeline companies and was an "Affiliate of Transporter" within the meaning of this tariff provision. Therefore, by terms of tariff provision 3.2b(1), the lowest transportation rate MGC and MPC offered to Omega is the maximum rate they can charge to a non-affiliated shipper.

2. Section 3.2(c) of those tariffs, as quoted in the previous paragraph, specifies that if Staff determines that the provisions of Section 3.2(b) and Section 12(c)⁸⁶ of the General Terms and Conditions Section of the tariffs are "not effective in preventing rate discrimination to non-affiliates", it may, "after contacting Transporter, ... file a notice to that effect with the Commission." Once Staff files its notice, Sections 3.2(b) and Section 12(c) are to be automatically replaced with a revised tariff provision that simply states that "[t]he transportation rate charged to any affiliate on the Transporter's pipeline . . . shall be the maximum rate which may be charged to non-affiliates."

3. MPC and MGC contend the lower tariff rates charged to affiliates would not become the effective rate charged to non-affiliates until after Staff issues the notice to the Commission described in tariff section 3.2c. However, that reading of the tariff would not allow all aspects of the tariff to given their appropriate meaning. The Commission concludes that the correct interpretation of these tariff provisions is that section 3.2b(1) establishes that the lowest rate charged to an affiliated shipper is the highest rate that can be charged to non-affiliated shippers. Subsections 3.2b (2)-(5) of that section then establish a procedure by which MPC or MGC could obtain an exception to that rule by requesting Commission approval of specific agreements that would allow for the charging of a lower rate to an affiliated shipper. The purpose of section 3.2c is to allow Staff to eliminate the possibility that MPC or MGC could obtain an exception to the general rule by eliminating subsections (2)-(5) if Staff finds that MPC and

⁸⁵ Ex. 70, Tariff Sheet Nos. 6-7 and 16-17, Ex. 71, Tariff Sheet Nos. 5-6 and 16-17. The Commission required MPC and MGC to include these provisions in their tariffs as a condition for approving the transfer of those companies to UtiliCorp in 1994. See, *In the Matter of the Joint Application of Missouri Gas Company, Missouri Pipeline Company, and UtiliCorp United, Inc.*, Report and Order on Rehearing, 3 Mo. P.S.C. 236 (1994).

⁸⁶ Section 12.c requires the Transporter to supply a list of discounts offered to affiliated entities.

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MGC are abusing that exception process. In other words, if Staff brings 3.2c into effect by giving notice to the Commission, the requirement that the lowest rate charged to an affiliated shipper becomes the highest rate that can be charged to a non-affiliated shipper becomes absolute, with no possible exceptions.

4. A tariff that has been approved by this Commission becomes Missouri law, with the same force and effect as a statute directly prescribed by the legislature. For that reason, tariffs are to be interpreted in the same manner as a statute.⁸⁷ One principle of statutory construction holds that the legislature is presumed to intend that “every word, clause, sentence, and provision of a statute have effect. Conversely, a presumption exists that the legislature does not insert idle verbiage or superfluous language in the statute.”⁸⁸ Applying that rule of construction to its interpretation of the tariff, the Commission must presume that section 3.2c was intended to have some meaning. The foregoing interpretation provides a reasonable meaning for that provision.

5. Missouri’s courts have held that “[t]he Commission has no jurisdiction to promulgate an order requiring a pecuniary reparation or refund.”⁸⁹ Therefore, the Commission cannot order MGC or MPC to make any refund to its customers. If any customer of MGC or MPC seeks such a refund, they will need to file an appropriate petition in circuit court.

6. MPC and MGC argue that the Commission cannot adjust their rates in this case because the Commission has not considered all relevant factors, including operating expenses and the utility’s rate of return. The Commission is required to consider those factors in setting rates for a utility.⁹⁰ However, this is not a rate case and the Commission is not attempting to determine an appropriate rate for the companies. Rather, the Commission is simply considering Staff’s complaint and determining the applicability of a provision contained in MPC and MGC’s tariffs. Simply put, the Commission is acting to enforce an existing tariff rather than exercising its ratemaking authority.

Decision

Did MPC and MGC provide transportation service to its affiliate, Omega, at a discounted rate, and if so, should this rate

⁸⁷ State ex rel. Laclede Gas Co. v. Pub. Serv. Comm’n, 156 S.W.3d 513, 521 (Mo. App. W.D. 2005).

⁸⁸ Cook v. Newman, 142 S.W.3d 880, 892 (Mo. App. W.D. 2004).

⁸⁹ DeMaranville v. Fee Fee Trunk Sewer, Inc., 573 S.W. 2d 674, 676 (Mo. App. E.D. 1978).

⁹⁰ State ex rel. Util. Consumers Council of Mo., Inc. v. Pub. Serv. Comm’n, 585 S.W. 2d 41, 49 (Mo banc. 1979)

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become the maximum rate that MPC and MGC could charge any of its non-affiliated customers for similar services?

The recreated invoices offered into evidence by Staff show the rate that MPC and MGC actually charged their affiliate, Omega, for transporting natural gas to Omega's gas marketing customers. Those invoices demonstrate that the pipeline companies offered discounted transportation rates to their affiliate. By the explicit terms of their tariffs, the lowest transportation rate MPC and MGC charged an affiliate is the maximum rate they can charge to a non-affiliate.

For MPC and MGC, those discounted rates, and the dates when the rates were first offered to an affiliate, are shown in the following chart:

Transportation Type/ Delivery Points	Firm	Firm	Interruptible
	Reservation per MDQ	Commodity Per Dt.	Commodity Per Dt.
MPC Delivery	\$0.00 beginning May 1, 2005	\$.1699	\$.1699 beginning September 1, 2003
MGC Delivery Except the Fort	\$0.00 beginning May 1, 2005	\$.20 beginning July 1, 2003	\$.20 beginning September 1, 2003
MGC Delivery to the Fort	\$18.10	\$.30 beginning February 1, 2005	\$1.15

Count IV

Findings of Fact

The fourth count of Staff's complaint alleges that MPC and MGC violated their tariffs by failing to disclose the discounted transportation rates they gave to their affiliate, Omega. Section 12.c of the General Terms and Conditions section of MPC and MGC's tariffs require them to submit a quarterly report to Staff listing bids or offers they quote for transportation service rates where the bid is for less than the maximum rate established in the tariff. As part of the report, MGC and MPC are required to disclose whether the entity that would receive the discounted rate is an affiliate.⁹¹ In

⁹¹ Ex. 70, Tariff Sheet No. 39, and Ex. 71, Tariff Sheet No. 39.

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the second and third quarters of 2003, MPC and MGC did not report the discounted rates that it gave to Omega.⁹² Nor did it report giving a discount to any other entity, affiliated or not. The discounts that Staff says MPC and MGC should have reported are the discounts for transportation of gas to the City of Cuba and G-P Gypsum discussed in detail regarding Count III of Staff's complaint. Regardless of whether those discounts were given to Cuba or to Omega, the recreated invoices offered into evidence by Staff demonstrate conclusively that MPC and MGC gave transportation discounts during that period.

MPC and MGC agree that they did not report the discounts described by Staff, but contend that they were under no obligation to report those transactions since the discounts were offered to the City of Cuba, which is not an affiliate.

Conclusions of Law

1. Section 12.c of the General Terms and Conditions section of MPC and MGC's tariffs states as follows:

12. Operation of Rate Schedule in Conjunction with
Marketing Affiliates.

...

c. Transporter will submit to the Commission's Energy – Rates Staff once every three months, a list of all bids or offers Transporter quotes for transportation service rates for its pipeline where the bid is less than the Maximum Rate contained in this tariff for Transporter's area. Transporter will provide the bid price quoted, the length of and dates of all offerings, the name, address and telephone number of the party to whom the bid was given, any other terms of the bid and a rate comparison sheet for all bids and offers for each month. For each such bid or offering, Transporter will completely explain whether the entity being offered the rate is affiliated in any way with Transporter or with any of its affiliates. If the entity is affiliated, Transporter will completely explain such affiliation. Transporter will respond

⁹² Imhoff Direct, Ex. 1, Page 10, Lines 27-30.

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immediately to Staff inquiries concerning
discounting.⁹³

This tariff provision requires MPC and MGC to file a report any time they offer a discount to any shipper on their pipelines. It requires them to file additional information if the discount is offered to an affiliate, but it requires the basic report to be filed regardless of whether an affiliate is involved.

Decision

Did MPC and MGC violate their tariffs by failing to report their offer of discounted transportation service to its affiliate, Omega, in its second quarter and third quarter 2003 reports to the Commission's Energy Staff?

The tariff provision in question is designed to allow Staff to monitor the affiliate transactions in which MPC and MGC might engage to ensure that such transactions are not abusive. The plain language of the tariff requires MPC and MGC to report all offered discounts to Staff in a quarterly report. All discounts must be reported, regardless of whether the discounts are offered to an affiliate. The recreated invoices conclusively show that MPC and MGC offered discounts to shippers on their pipelines in the second and third quarters of 2003. Those discounts were not reported to Staff, and thereby the tariff provision was violated. Staff proved count IV of its complaint.

Count V

Findings of Fact

The fifth count of Staff's complaint alleges that MGC violated its certificate of convenience and necessity by constructing a new lateral line off the pipeline to provide service to Willard Asphalt, a gas-marketing customer of Omega.

MGC was issued a certificate by the Commission in Case No. GA-90-280. In a subsequent case, in which the Commission authorized the sale of MPC and MGC to UtiliCorp, the Commission found that "the certificates issued, and which will be passed to UCU as the result of this purchase, are for the operation of a natural gas pipeline. This does not include the sale of gas, the by-pass of LDCs, or operation other than in the designated territory."⁹⁴ In other words, MGC holds a line certificate of convenience from the Commission allowing it to transport natural gas

⁹³ Ex. 70, Tariff Sheet No. 39, Ex. 71, Tariff Sheet No. 39.

⁹⁴ Ex. 83, In the Matter of the Joint Application of Missouri Gas Company, Missouri Pipeline Company, and UtiliCorp United, Inc., Report and Order, 3 Mo P.S.C. 3d 216, 223 (1994).

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through a described corridor. It does not hold an area certificate that would authorize it to distribute gas to retail customers.

In 2004, MGC constructed a lateral extension from its pipeline to establish a new delivery point to provide gas service to Willard Asphalt. The lateral extension runs about 1400 feet from the pipeline to connect with the asphalt plant's gas system at a new meter station. The entire extension is located on Willard Asphalt's property.⁹⁵ Willard Asphalt entered into a Natural Gas Sales Agreement with Omega beginning on April 1, 2004.⁹⁶

Staff also alleges that MGC violated its tariff by not requiring either Willard Asphalt or Omega to pay the cost of constructing that lateral line. MGC's tariff requires a shipper, in this case, either Willard Asphalt or Omega, to reimburse the pipeline for the cost of constructing facilities needed to deliver gas to the shipper.⁹⁷ The cost of constructing the lateral to serve Willard Asphalt is on MGC's books, and neither Willard Asphalt, nor Omega, has reimbursed MGC for those costs.⁹⁸

MGC concedes that it paid the cost to construct the lateral but defends that cost as a prudent business decision. MGC indicates that it added a new delivery point to its pipeline to allow it to serve Willard Asphalt, and to create a second delivery point to aid the City of St. Robert in the expansion of its municipal gas system.⁹⁹ MGC also states that the construction of the lateral has substantially increased its revenues and has been a sound investment.¹⁰⁰ Furthermore, MGC has not filed a rate case since the lateral was constructed. As a result, the cost of constructing the lateral is not reflected in MGC's current rates.

Conclusions of Law

27. Section 6.e of the General Terms and Conditions section of MGC's tariff states as follows:

6. Statements and Payments.

e. Shipper will reimburse Transporter or cause Transporter to be reimbursed for any and all costs and expenses incurred in constructing, establishing or modifying the facilities required for

⁹⁵ Transcript, Page 669, Lines 17-25.

⁹⁶ Ex. 33.

⁹⁷ Ex. 70, Tariff Sheet No. 31, General Terms and Conditions Section 6.e.

⁹⁸ Schallenberg Direct, Ex. 19, Pages 35-36, Lines 25-27, 1-2, and Transcript, Page 334, Lines 24-25.

⁹⁹ Ries Rebuttal, Ex. 304, Page 42, Lines 8-14.

¹⁰⁰ Id. at Page 43, Lines 6-18.

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receipt and/or delivery of gas hereunder. Upon request, an estimate shall be provided in writing to the Shipper with a breakdown showing at least the major cost components. Shipper shall be responsible for reimbursing Transporter for only the actual costs incurred by Transporter in constructing, establishing or modifying the facilities required for receipt and/or delivery of gas hereunder.

Decision

Did MGC construct a lateral line for a certain industrial customer to benefit its affiliate, Omega, without demanding reimbursement from either Omega or the customer, in violation of its tariff or its certificate?

Staff established that MGC constructed a short, 1400 foot, line from its main pipeline to establish a connection to serve an industrial customer. MGC can establish a new connection point on its pipeline without violating its line certificate, but at some point, an authorized new connection becomes long enough to constitute a new lateral line that would require a revised certificate. Staff did not present sufficient evidence to establish that this new connection required a revised certificate and that its construction violated MGC's existing certificate of convenience and necessity. Staff has the burden of proving its complaint and it has failed to meet that burden with regard to this aspect of Count V.

The other aspect of Count V alleges MGC violated its tariff by failing to demand reimbursement from the shipper for the cost of constructing the lateral line. MGC's tariff requires the shipper to reimburse MGC for those costs and MGC apparently has not attempted to collect that reimbursement, instead carrying those costs on its own books. Therefore, MGC has violated its tariff.

So far, however, MGC's decision not to seek reimbursement of those costs has not had any impact on its customers. Those costs have not been included in the calculation of MGC's costs for purposes of establishing rates because MGC's rates have not been adjusted since those costs were incurred. MGC's decision not to seek reimbursement of these costs may become important in a future rate case, but it is of no importance now. As a result, there is no need for Staff to seek penalties against MGC for this violation of its tariff.

Count VI

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Staff's complaint originally contained a sixth count alleging that MPC and MGC violated their tariffs by providing preferential terms of payment to Omega. In his surrebuttal testimony, Bob Schallenberg indicated that Staff is no longer seeking relief on this count.¹⁰¹ Since Staff is no longer seeking relief under this count, the Commission will not address it further.

GENERAL CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law that are applicable to all counts of Staff's complaint:

1. MPC and MGC are "Gas Corporations" and "Public Utilities," as those terms are defined at Section 386.020 (18) and (42), RSMo Supp. 2006. As such, they are subject to regulation by this Commission.

2. Section 393.140(1), RSMo 2000 gives the Commission general supervisory authority over all Missouri gas corporations.

3. Section 393.140(11), RSMo 2000 gives the Commission the power to require every gas corporation to file and maintain public tariffs describing the rates it will charge, as well as the terms under which it will offer service to the public. That section also requires a gas corporation to comply with the terms of its own tariff.

4. A tariff that has been approved by the Commission becomes Missouri law, with "the same force and effect as a statute directly prescribed from the legislature."¹⁰²

5. MPC and MGC are obligated to comply with the provision of their own tariffs.

6. Section 386.390.1, RSMo 2000, authorizes the Commission to bring a complaint against a public utility on its own motion.

7. As the party bringing a complaint, Staff has the burden of proving its allegations.¹⁰³

8. Section 386.570.1, RSMo 2000 provides that any public utility that fails to comply with any provision of law, or with any "order, decision, decree, rule, direction, demand or requirement" of the Commission "is subject to a penalty of not less than one hundred dollars nor more than two thousand dollars for each offense."

¹⁰¹ Schallenberg Surrebuttal, Ex. 67, Page 1, Lines 17-22.

¹⁰² State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n, 156 S.W. 3d 513, 521, (Mo. App. W.D. 2005)

¹⁰³ State ex rel. GS Technologies Operating Co., Inc. v. Pub. Serv. Comm'n, 116 S.W.3d 680 (Mo. App. W.D. 2003).

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9. The General Counsel of the Commission is authorized by Section 386.600, RSMo 2000, to bring an action in circuit court to recover a penalty against a public utility.

IT IS ORDERED THAT:

1. Staff proved the allegations contained in Count I of its complaint. The Commission's General Counsel is authorized, pursuant to Section 386.600, RSMo 2000, to file a petition in the circuit court of his choosing to seek any applicable penalties against Missouri Pipeline Company and Missouri Gas Company.

2. Staff failed to prove the allegations contained in Count II of its complaint and relief on that Count is denied.

3. Staff proved the allegations contained in Count III of its complaint. By the terms of their tariffs, the rates Missouri Pipeline Company and Missouri Gas charged to an affiliated shipper became the maximum rate that could be charged to a non-affiliated shipper, as indicated in the following chart:

Transportation Type/ Delivery Points	Firm	Firm	Interruptible
	Reservation per MDQ	Commodity Per Dt.	Commodity Per Dt.
MPC Delivery	\$0.00 beginning May 1, 2005	\$.1699	\$.1699 beginning September 1, 2003
MGC Delivery Except the Fort	\$0.00 beginning May 1, 2005	\$.20 beginning July 1, 2003	\$.20 beginning September 1, 2003
MGC Delivery to the Fort	\$18.10	\$.30 beginning February 1, 2005	\$1.15

4. Staff proved the allegations contained in Count IV of its complaint. The Commission's General Counsel is authorized, pursuant to Section 386.600, RSMo 2000, to file a petition in the circuit court of his choosing to seek any applicable penalties against Missouri Pipeline Company and Missouri Gas Company.

5. With regard to Count V of its complaint, Staff failed to prove that MGC violated its certificate of convenience and necessity. Staff proved that MGC violated its tariff but relief for that violation is denied.

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6. Staff's Motion for Sanctions for Destruction of Documents is denied except for the adverse evidentiary inferences explained in the body of this Report and Order.
7. Respondents' Motion to Supplement Exhibit 311 is denied.
8. This Report and Order shall become effective on October 21, 2007.

Davis, Chm., Clayton, Appling, Jarrett, CC., concur;
Murray, C., dissents
and certify compliance with the provisions
of Section 536.080, RSMo 2000.

NOTE: See pages 295 and 383 for other orders in this case.

**Staff of the Public Service Commission of the State of Missouri v.
Comcast IP Phone, LLC**

*Case No. TC-2007-0111
Decided: November 1, 2007*

Telecommunications §3.1. The Commission concluded that Comcast IP Phone, a fixed VoIP service, is a "Telecommunications Company" and "Public Utility" which is subject to regulation by the Commission. The Commission has ordered that Comcast IP Phone either cease providing Comcast Voice by December 10, 2007 or apply for an appropriate certificate of service authority to provide that service.

Telecommunications. §3.2. The Commission concluded that Comcast IP Phone, a fixed VoIP service, is a "Telecommunications Company" and "Public Utility" which is subject to regulation by the Commission. The Commission has ordered that Comcast IP Phone either cease providing Comcast Voice by December 10, 2007 or apply for an appropriate certificate of service authority to provide that service.

Telecommunications §3.3. The Commission concluded that Comcast IP Phone, a fixed VoIP service, is a "Telecommunications Company" and "Public Utility" which is subject to regulation by the Commission. The Commission has ordered that Comcast IP Phone either cease providing Comcast Voice by December 10, 2007 or apply for an appropriate certificate of service authority to provide that service.

Appearances

William K. Haas, Deputy General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

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Mark P. Johnson and Roger W. Steiner, Sonnenschein Nath & Rosenthal LLP, 4520 Main Street, Suite 1100, Kansas City, Missouri 64111, for Comcast IP Phone, LLC.

Michael Dandino, Deputy Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel.

Craig S. Johnson, Attorney at Law, 1648-A East Elm Street, Jefferson City, Missouri 65101, for the Missouri Independent Telephone Company Group.

REGULATORY LAW JUDGE: Morris L. Woodruff, Deputy Chief Regulatory Law Judge

REPORT AND ORDER

Syllabus: In response to a complaint brought by its Staff, the Commission finds that Comcast IP Phone is offering local exchange and interexchange telecommunications services in Missouri without the required certificates of service authority. The Commission orders Comcast IP Phone to either apply for the appropriate certificate, or stop offering the service. The Commission denies Staff's request for authority to seek civil monetary penalties against Comcast IP Phone.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Procedural History

On September 21, 2006, the Staff of the Commission filed a complaint against Comcast IP Phone, LLC. Staff's complaint alleges Comcast IP Phone is offering local exchange and interexchange telecommunications services in Missouri without a certificate of service authority from the Commission, in violation of Missouri law.

By a notice issued on September 26, 2006, pursuant to Commission Rule 4 CSR 240-2.070(7), the Commission served a copy of Staff's complaint on Comcast IP Phone. Comcast IP Phone responded on October 26, 2006, contesting the Commission's jurisdiction in a motion asking the Commission to dismiss Staff's complaint. The Commission denied the motion to dismiss on December 5, 2006, and directed Comcast

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IP Phone to file its answer to Staff's complaint. Comcast IP Phone filed a timely answer on December 26, 2006.

Meanwhile, on October 30, 2006, the Missouri Independent Telephone Company Group, (MITG) an affiliation of six small rural incumbent local exchange companies, filed an application to intervene in support of Staff's complaint.¹ The Commission granted MITG's application to intervene on November 7, 2006.

The Commission established a procedural schedule that required the parties to prefile direct, rebuttal, and surrebuttal testimony. The Commission conducted an evidentiary hearing for the purpose of cross-examination of those witnesses on July 25, 2007. The parties filed initial post-hearing briefs on September 14, 2007, followed by reply briefs on October 12, 2007. In addition, the Commission received *amicus curiae* briefs from the Small Telephone Company Group, Embarq Missouri, Inc., d/b/a Embarq, and AT&T Missouri.

Comcast IP Phone and the Services it Offers

Comcast IP Phone, the respondent in this complaint, is a direct subsidiary of Comcast Cable Communications, LLC,² which is primarily a cable television provider. Comcast IP Phone, has never applied for, nor been granted, a certificate of service authority to provide either basic local or interexchange telecommunications services in Missouri.³

Since April 17, 2006, Comcast IP Phone has offered an all-distance Voice over Internet Protocol (VoIP) telecommunications service to customers in multiple municipalities in Missouri.⁴ Comcast IP Phone calls its VoIP service Comcast Digital Voice, and offers that service in several communities located near Kansas City.⁵

Comcast IP Phone provides its Comcast Digital Voice customers with equipment that allows the customer to plug their home phone into the

¹ The members of MITG are Alma Communications Company, d/b/a Alma Telephone Company; Chariton Valley Telephone Corporation; Choctaw Telephone Company; Mid-Missouri Telephone Company; MoKan DIAL, Inc.; and Northeast Missouri Rural Telephone Company.

² Choroser Rebuttal, Ex. 3, Page 1, Lines 10-13.

³ See the allegations in paragraphs 13 and 14 of Staff's complaint, which Comcast IP Phone admitted in its answer.

⁴ Transcript, Page 87, Lines 15-21.

⁵ Ex. 6. The municipalities in which Comcast IP Phone offers the service are: Baldwin Park, Bates City, Blue Springs, Buckner, Grain Valley, Greenwood, Independence, Lake Lotawana, Lake Winnebago, Lake Tapawingo, Lee's Summit, Oak Grove, Odessa, Pleasant Hill, Raymore, Raytown, Sibley, and Sugar Creek.

coaxial cable that delivers cable television into the home. That equipment converts phone signals and voice into IP voice packets and IP data packets destined for the internet, which are transmitted to equipment at Comcast's end of the cable. Voice packets are delivered to a soft switch that routes them to their destination. If the call is destined for a customer of another phone company, the IP packets must be converted to TDM (Time Division Multiplex) signals so they can be sent to the public switched telephone network. That conversion is called a net protocol change.⁶ If a call is destined for another Comcast Digital Voice customer, even a customer in another state, the signal may not be converted and would not pass over the public switched telephone network.⁷

Comcast IP Phone's Comcast Digital Voice customers use that service to transmit information by wire, radio, and optical cable between points within an exchange defined by AT&T as the incumbent local exchange carrier.⁸ Similarly, the Comcast Digital Voice service is used to transmit information by wire, radio, and optical cable between points in two or more exchanges defined by AT&T.⁹

Comcast Digital Voice is a fixed VoIP service. That means the service is available only over the fixed coaxial cable connected to the customer's home or business.¹⁰ As a fixed VoIP service, Comcast Digital Voice differs from the VoIP telecommunications service offered by providers such as Vonage. Vonage does not own a coaxial cable or other means of providing a high-speed connection to its customers. Therefore, it offers its VoIP service to customers who establish their broadband connection with another service provider. Since Vonage's service relies on third-party broadband connections, that service is not tied to a specific location. A Vonage customer can make a phone call from anywhere in the world that has access to a broadband connection to the internet. Furthermore, a Vonage customer can choose a phone number from a variety of U.S. rate centers. In contrast, a Comcast Digital Voice customer is required to use a primary phone number that correlates to the physical location of the connection to Comcast's cable.¹¹

The differences between Comcast Digital Voice's fixed VoIP service and the nomadic VoIP service offered by Vonage are important because the

⁶ Choroser Rebuttal, Ex. 3, Pages 3-4, Lines 17-26, 1-6.

⁷ Transcript, Page 108, Lines 11-25.

⁸ Ex. 4.

⁹ Ex. 5.

¹⁰ Choroser Rebuttal, Ex. 3, Page 4, Lines 22-24.

¹¹ Choroser Rebuttal, Ex. 3, Pages 4-5, Lines 7-26, 1-4.

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Federal Communications Commission (FCC) has declared that the services offered by Vonage are subject to the exclusive jurisdiction of the FCC and that the various states cannot regulate those services. The question of whether the states can regulate fixed VoIP services, such as Comcast Digital Voice, is still undecided. That question will be further addressed in the Commission's Conclusions of Law.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law regarding Staff's complaint:

1. Comcast IP Phone is a "Telecommunications Company" and "Public Utility," as those terms are defined at Subsections 386.020 (51) and (42), RSMo Supp. 2006. As such, it is subject to regulation by this Commission.

2. Subsection 386.390.1, RSMo 2000, authorizes the Commission to bring a complaint against a public utility on its own motion.

3. As the party bringing a complaint, Staff has the burden of proving its allegations.¹²

4. Section 386.360.1, RSMo 2000, provides:

[w]henver the commission shall be of the opinion that a public utility, municipal gas system, person or corporation is failing or omitting or about to fail or omit to do anything required of it by law or by order or decision of the commission, or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order or decision of the commission, it shall direct the general counsel to the commission to commence an action or proceeding in any circuit court of the state of Missouri in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunctions.

5. Section 386.570.1, RSMo 2000, provides that any public utility that fails to comply with any provision of law, or with any "order, decision, decree, rule, direction, demand or requirement" of the Commission "is subject to a penalty of not less than one hundred dollars nor more than two thousand dollars for each offense."

¹² State ex rel. GS Technologies Operating Co., Inc. v. Pub. Serv. Comm'n, 116 S.W.3d 680 (Mo. App. W.D. 2003).

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6. The General Counsel of the Commission is authorized by Section 386.600, RSMo 2000, to bring an action in circuit court to recover a penalty against a public utility.

7. Section 392.410.2, RSMo (Supp. 2006), states as follows:

No telecommunications company offering or providing, or seeking to offer or provide, any interexchange telecommunications shall do so until it has applied for and received a certificate of interexchange service authority pursuant to the provisions of subsection 1 of this section. No telecommunication company offering or providing, or seeking to offer or provide, any local exchange telecommunications service shall do so until it has applied for and received a certificate of local exchange service authority pursuant to the provisions of section 392.420.

8. Section 386.020(53), RSMo (Supp. 2006), defines "telecommunications service" as "the transmission of information by wire, radio, optical cable, electronic impulses, or other similar means."

9. Section 386.020(24), RSMo (Supp. 2006), defines "interexchange telecommunications service" as "telecommunications service between points in two or more exchanges."

10. Section 386.020(31), RSMo (Supp. 2006), defines "local exchange telecommunications service" as "telecommunications service between points within an exchange."

11. The Commission has found as a fact, that the Comcast Digital Phone service offered by Comcast IP Phone is used by customers to "transmit information by wire, radio and optical cable" both within and between exchanges. Therefore, Comcast Digital Phone service meets the statutory definition of a telecommunications service and under Missouri's statutes; Comcast IP Phone must have a certificate of service authority before offering that service to its customers.

12. Missouri's statutes and regulatory scheme are not, however, the only factors at play in this case. The FCC also regulates telecommunications services at the federal level. Consistent with the Supremacy Clause of the United States Constitution, the FCC has the authority to preempt state regulation that would conflict with federal regulation of telecommunications services. In general, the FCC regulates interstate telecommunications services, while local and intrastate services are left to be regulated by the various states. Therefore, the Commission may be preempted from exercising regulatory authority over some

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telecommunications services that would meet the definitions established by Missouri's statutes.

13. The FCC has explicitly preempted state regulation of nomadic VoIP service. The Minnesota Public Utility Commission had sought to regulate Vonage's DigitalVoice VoIP service. In its decision preempting the Minnesota PUC's order, the FCC held that the Minnesota Commission "may not require Vonage to comply with its certification, tariffing or other related requirements as conditions to offering DigitalVoice in that state."¹³

In making its decision to preempt Minnesota's regulation of DigitalVoice, the FCC found that as a practical matter, because calls could originate from anywhere in the world where a broadband connection could be made, it was impossible to separate the intrastate calls made using DigitalVoice from interstate calls. Thus precluding dual state and federal regulation of that VoIP service. On that basis of impossibility, the FCC found that federal regulation must prevail to preempt state regulation.

As described in the Findings of Fact section of this order, the Comcast Digital Voice service offered by Comcast IP Phone is a fixed VoIP service that differs from the nomadic VoIP DigitalVoice service offered by Vonage. Since a call using a fixed VoIP service must originate from a fixed connection to a cable, the difficulty of separating intrastate calls from interstate calls that led the FCC to preempt state regulation of the services offered by Vonage does not apply to a fixed VoIP service. Therefore, the FCC's *Vonage* decision has not explicitly preempted state regulation of fixed VoIP service.

14. In its *Vonage* decision, the FCC predicted that it would likely also preempt state regulation of fixed VoIP services if that issue were presented to it in a future case. In the conclusion section of the *Vonage* decision, the FCC stated:

Moreover, for services having the same capabilities as DigitalVoice, the regulations of other states must likewise yield to important federal objectives. To the extent other entities, such as cable companies, provide VoIP services, we would preempt state regulation to an extent comparable to what we have done in this Order.

However, when the *Vonage* decision was appealed to the U.S. 8th Circuit Court of Appeals, the New York Public Service Commission challenged the

¹³ *Vonage Holding Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Pub. Util. Comm'n*, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22433 (November 12, 2004)

portion of the FCC's order that suggested state regulation of fixed VoIP service was likely to be preempted. In defending its order, the FCC argued that the question of preemption of state regulation over fixed VoIP service was not yet ripe for judicial review. The court agreed, stating:

We conclude the NYPSC's challenge to the FCC's order is not ripe for review. The order only suggests the FCC, if faced with the precise issue, would preempt fixed VoIP services. Nonetheless, the order does not purport to actually do so and until that day comes it is only a mere prediction. . . . As a consequence, NYPSC's contention that state regulation of fixed VoIP services should not be preempted remains an open issue.¹⁴

Thus, it is clear that the FCC has not yet preempted state regulation of fixed VoIP service of the sort offered in Missouri by Comcast IP Phone.

15. The FCC opened a rulemaking docket in 2004 to ultimately determine how all IP-enabled services, including fixed VoIP services, should be regulated.¹⁵ However, the FCC has not yet issued any rules and has not indicated when, if ever, it will do so. Even if the FCC eventually indicates an intent to preempt state regulation of fixed VoIP services, that decision will likely be subject to lengthy judicial appeals. Therefore, the Commission will not defer its decision on the regulation of fixed VoIP service while waiting for the FCC to act.

16. Comcast IP Phone also contends the Commission has already issued a decision in an arbitration case finding that internet protocol to public switched telephone network (IP-PSTN) traffic is an enhanced information service and not a telecommunications service under the Telecommunications Act because such traffic undergoes a net-protocol change.¹⁶ In the context of that arbitration decision, that means IP-PSTN traffic is subject to intercarrier compensation at reciprocal compensation rates rather than switched access charges. Comcast IP Phone contends the principle that IP-PSTN traffic, which includes VoIP traffic, is an information service, not a telecommunications service, would preclude state regulation of that service.

¹⁴ *Minn. Pub. Serv. Comm'n v. FCC*, 483 F.3d 570, 582-583 (8th Cir. 2007).

¹⁵ *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004).

¹⁶ *Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement ("M2A")*, Commission Case No. TO-2005-0336, 13 Mo P.S.C. 3d 519 (2005).

However, the FCC has not yet classified VoIP traffic as either an information service or a telecommunications service. That is one of the issues remaining to be decided in the FCC's pending rulemaking proceeding. The fact that this Commission made that finding in the narrow context of an arbitration decision regarding intercarrier compensation does not bind the Commission to reach the same conclusion in the broader context of this decision. The Commission concludes that its earlier decision in the arbitration case does not preclude it from addressing anew the question of its jurisdiction over a fixed VoIP service.

17. Assuming the Commission finds that it has the legal authority to regulate Comcast Digital Voice, Comcast IP Phone urges the Commission to refrain from exercising that authority while the question of state jurisdiction is before the FCC. Comcast IP Phone suggests there is no pressing need for state regulation of its VoIP service because it is a competitive service being offered in a competitive market. According to Comcast IP Phone, market forces are sufficient to protect Missouri's consumers without the need for regulation. Furthermore, Comcast IP Phone complains it would incur substantial expenses to modify its billing system to meet state requirements if it is found to be subject to state regulation.¹⁷

The problem with Comcast IP Phone's request that the Commission refrain from regulating the services it offers is that the controlling statute does not give the Commission the discretion to decide not to regulate a service that the legislature has determined should be regulated. The Comcast Digital Phone service that Comcast IP Phone offers meets the statutory definition of a telecommunications service subject to regulation by the Commission. The Commission cannot ignore the requirements of the statute and therefore, Comcast IP Phone must apply for a certificate of service authority to provide that service. If Comcast IP Phone believes that application of particular Commission Rules or state statutes would be unduly burdensome, it may request waiver of those rules or statutes pursuant to Section 392.361.5, RSMo 2000. So that Comcast IP Phone will have an opportunity to seek appropriate waivers before complying with this order, the Commission will give this order a sixty-day effective date.

DECISION

Based on the facts as it has found them, and its conclusions of law, the Commission finds that Comcast IP Phone is offering and providing local exchange and interexchange telecommunications services without a

¹⁷ Choroser Rebuttal, Ex. 3, Pages 19-20, 1-12.

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certificate of convenience and necessity in violation of Section 392.410.2, RSMo (Supp. 2006).

Staff's complaint asks for authority to file a petition in circuit court to seek imposition of civil penalties against Comcast IP Phone for its failure to obtain a certificate of convenience and necessity before offering its Comcast Digital Phone service in Missouri. The Commission finds that Comcast IP Phone's failure to obtain a certificate of convenience and necessity is due to a reasonable disagreement regarding the Commission's authority to regulate the services it provides, not from any disregard for the authority of the Commission. In this circumstance, the Commission finds that it would not be appropriate to seek civil penalties against Comcast IP Phone at this time.

IT IS ORDERED THAT:

1. No later than December 10, 2007, Comcast IP Phone shall either cease providing Comcast Voice Service, or apply for an appropriate certificate of service authority to provide that service.
2. This Report and Order shall become effective on December 31, 2007.

Davis, Chm., Murray, with separate concurrence to follow, Clayton, Jarrett, CC., concur and certify compliance with the Provisions of Section 536.080, RSMo.
Appling, C., absent

CONCURRING OPINION OF COMMISSIONER CONNIE MURRAY

I reluctantly cast my vote for the Report and Order because it is my opinion that state law, as it currently exists, permits this Commission no alternative, at least until such time as the FCC preempts state jurisdiction over fixed VoIP service.

Missouri state law defines "telecommunications company" and telecommunications service" so broadly¹⁸ that even VoIP service providers are required to obtain a certificate of public convenience and necessity from the commission in order to transact

¹⁸ RSMo 386.020 (Supp. 2006)

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any business in this state.¹⁹ Preemption by the FCC has occurred only to the extent that VoIP service is nomadic, as in *Vonage*.²⁰

That is not to say that I agree with the public policy decision to regulate fixed VoIP service. It is my hope that the Missouri legislature will act quickly to change the outdated telecommunications statutes and clarify that VoIP service providers are not subject to state telecommunications requirements. Until then or until the FCC acts to preempt state jurisdiction, this Commission must impose burdensome and potentially expensive requirements on these new technologies simply because they deliver voice service from a fixed location. The public is not well served by outdated regulation.

¹⁹ RSMo 392.410 (Supp. 2006)

²⁰ *Vonage Holding Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utility Commission, Memorandum Opinion and Order*, 19 FCC Red 22404, (November 12, 2004)

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In the Matter of an Investigation into City Utilities of Springfield Plastic Pipe Failures and the Adequacy of Its Leak Survey Procedures, Installation Procedures and Replacement Criteria

*Case No. GS-2004-0257
Decided: November 1, 2007*

Gas §16. The Commission adopted the Joint Recommendation Concerning Pipeline Replacement Schedule. This Recommendation states that the City Utilities will continue to conduct an annual leakage survey over "pre-1983 psig plastic piping" and will continue to conduct quarterly leak surveys of the downtown business district.

ORDER ADOPTING JOINT RECOMMENDATION

On December 30, 2003, the Commission issued an order establishing this case to investigate the issues concerning plastic mains and service lines used by City Utilities of Springfield. On March 30, 2007, the Staff of the Missouri Public Service Commission filed a report detailing the current status of the City Utilities plastic pipe monitoring, evaluation, and replacement program. The report recommended several changes to the current plastic pipe replacement program. City Utilities responded with several objections to certain recommendations.

After a series of responses, and further negotiations, Staff and City Utilities filed a Joint Recommendation Concerning Pipeline Replacement Schedule in which the two parties agreed to modifications of the replacement program and requested the Commission adopt those recommendations.

Staff and City Utilities agreed to the amount of Aldyl "A" polyethylene piping that would be replaced on an annual basis. These replacements will be the segments listed of the Plastic Pipe Failure Master List and segments that have been identified as being in a rock-dirt backfill based on the exposed pipe reports and spot checks conducted. The replacements will be prioritized based on the relevant risk factors as listed in the joint recommendation.

Staff and City Utilities will also evaluate the effectiveness of the two-year replacement program and will make additional recommendations for a program that will begin in calendar year 2010.

In addition, City Utilities will continue to conduct an annual leakage survey over "pre-1983 60 psig plastic piping" and will continue to conduct quarterly leak surveys of the downtown business district. City Utilities will also continue to inspect any exposed plastic piping and shall add that pipe

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to the Plastic Pipe Failure Master List as appropriate. Finally, City Utilities will begin conducting annual leakage surveys on "1983 and 1984 60 psig plastic piping."

The joint recommendation also requests that the Commission acknowledge the accomplishments that have occurred under the replacement program to date.

The Commission has reviewed all the filings including the joint recommendation. The Commission determines that the joint recommendation is reasonable and necessary for the public interest, health and safety and therefore, shall direct that those recommendations be implemented. The Commission also recognizes the accomplishments made by City Utilities since the beginning of the plastic pipe replacement program as set out in the Accomplishments section of the joint recommendation.

Staff and City Utilities shall continue to monitor the effectiveness of the replacement program and shall alert the Commission to any enhancements that are necessary as soon as they become apparent. In addition, the Commission shall direct City Utilities to continue its reporting requirements as set out in the joint recommendation and shall direct its Staff to file an additional status report as set out below. Because no action is expected in this matter until the next status report is filed, this case shall be administratively closed in the interim period.

IT IS ORDERED THAT:

1. The Joint Recommendation Concerning Pipeline Replacement Schedule is adopted.
2. The parties are directed to implement the terms of the joint recommendation.
3. The Staff of the Missouri Public Service Commission shall file an additional status report regarding the program no later than April 30, 2009.
4. This order shall become effective on November 11, 2007.
5. This case may be closed on November 12, 2007.

Davis, Chm., Murray, Clayton,
and Jarrett, CC., Concur.
Appling, C., Absent.

Dippell, Deputy Chief Regulatory Law Judge

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In the Matter of Embarq Missouri, Inc.'s Application for Competitive Classification Under Section 392.245.5, RSMo 2005

Case No. TO-2008-0147

Decided: November 29, 2007

Telecommunications §40. The Commission grants Embarq Missouri's request for competitive classification pursuant to Section 392.245.5 RSMo (Cum. Supp. 2006), other than exchange access service, for residential services in Ft. Leonard Wood, St. Robert, and Waynesville exchanges. The Commission also grants competitive classification for business services in the Warrensburg exchange. The Commission approves the tariff revision to implement the classifications.

ORDER GRANTING COMPETITIVE CLASSIFICATION

Syllabus: In this order, the Missouri Public Service Commission grants Embarq Missouri, Inc.'s request for competitive classification pursuant to Section 392.245.5, RSMo Cum. Supp. 2006, other than exchange access service, for residential services in the exchanges of Ft. Leonard Wood, St. Robert, and Waynesville, and for business services in the Warrensburg exchange. In addition, the Commission approves the tariff revision filed to implement these classifications.

Procedural History and Pending Motions

On November 6, 2007, Embarq Missouri, Inc., filed its Application for Competitive Classification pursuant to Section 392.245.5, RSMo. On November 16, 2007, and November 19, 2007, Embarq amended its application by removing certain exchanges from its application. Section (20) of 4 CSR 240-2.080 states that any party may amend a pleading within ten days without leave of the Commission if no responsive pleading has been filed. Therefore, no leave was necessary regarding the first request to amend. No response to the amended pleading was received, and therefore, leave is granted to amend the application as filed on November 19, 2007.

In its application, Embarq requested that the Commission classify as competitive its residential services, other than exchange access service, in its Ft. Leonard Wood, St. Robert, and Waynesville exchanges. Embarq also requested that its business services, other than exchange access service, be classified as competitive in its Warrensburg exchange. Concurrent with the filing of its application, Embarq filed a proposed tariff sheet to become effective on December 6, 2007, reflecting the requested competitive classifications.

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The Commission notified the parties and all certificated competitive local exchange carriers and incumbent local exchange carriers that any party wishing to intervene in the proceeding must file an application no later than November 15, 2007. No request for intervention was received.

The Commission also directed that any objections or recommendations from the Office of the Public Counsel or any other interested party be filed no later than November 19, 2007. The order further advised the parties that if no request for a hearing was received the remainder of the procedural schedule would be canceled, including the filing of testimony and hearing, and the Commission would make its determination based upon Embarq's verified application and Staff's verified recommendation and memorandum.

Staff filed its verified recommendation on November 19, 2007. As part of its recommendation, Staff filed affidavits from various wireless carriers and a facilities-based carrier. Those affidavits provided information about customers being served in the relevant exchanges. Staff recommended that Embarq's application be granted. No other response to the application was received and no party requested a hearing.

Overview

Embarq is a large incumbent local exchange carrier (ILEC) that is subject to price cap regulation under Section 392.245. Under price cap regulation, maximum allowable rates are established and other restrictions are placed on the ability of the regulated company to raise its rates. The statute that created price cap regulation includes provisions that allow a price cap regulated company to escape regulation when competition develops in the exchanges served by that company. If a carrier obtains competitive status in an exchange it will gain greater pricing flexibility and will be able to raise, or lower, the applicable tariffed rate for its services, except exchange access service, by giving ten days notice to the Commission and affected customers. An ILEC with competitive status in an exchange will have essentially the same pricing flexibility in that exchange as a CLEC.

The Commission must classify the ILEC's services as competitive in any exchange in which at least two other non-affiliated carriers are providing basic local telecommunications services within an exchange.¹ The statute provides that one commercial mobile radio service provider can be counted as an entity providing basic local telecommunications services.²

¹ Section 392.245.5(6), RSMo Cum. Supp. 2006.

² Section 392.245.5(1), RSMo Cum. Supp. 2006.

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The other entity that can be counted as providing basic local telecommunications services is one that provides "local voice service in whole or in part over telecommunications facilities or other facilities in which it or one of its affiliates have an ownership interest."³ Therefore, an exchange would be competitive in which two or more facilities-based wireline carriers are providing services to customers, or in which one facilities-based wireline carrier and one wireless carrier are providing services to customers.

Embarq's application indicates that it faces competition from at least one wireless carrier and one facilities-based wireline carrier for each exchange and type of service requested.

Findings of Fact

The Missouri Public Service Commission, having reviewed Embarq's pending tariff, the verified application and supporting documentation, and Staff's verified recommendation, memorandum and supporting documentation, which are admitted into evidence, makes the following findings of fact.

Embarq is a "local exchange telecommunications company" and a "public utility," and is authorized to provide "telecommunications service" within the state of Missouri as each of those phrases is defined in Section 386.020, RSMo 2000.⁴ Embarq is a large ILEC subject to price cap regulation.⁵

In its amended application, Embarq requested that the Commission classify as competitive its residential services, other than exchange access service, in the Ft. Leonard Wood, St. Robert, and Waynesville exchanges. Embarq also requested that its business services, other than exchange access service, be classified as competitive in its Warrensburg exchange. Embarq also filed a proposed tariff sheet to reflect those classifications.⁶ In support of this request, Embarq filed its verified application listing the facilities-based and wireless carriers competing in each exchange. Embarq specifically stated:

Embarq has experienced residential customer loss in its Ft. Leonard Wood, St. Robert, and Waynesville exchanges as a direct result of competitive entry by Comcast, Fidelity, EXOP, Mediacom and Time Warner. Embarq has experienced business customer

³ Section 392.245.5(2), RSMo Cum. Supp. 2006.

⁴ Second Amended Application for Competitive Classification, page 1.

⁵ *Id.*

⁶ *Id.* at Exhibit A.

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loss in its Warrensburg exchange as a direct result of competitive entry by Time Warner, Comcast, AT&T, and Socket.⁷

Staff also provided its verified recommendation, supporting memorandum, and affidavits in which it discussed its own investigation into the companies providing wireless and wireline service to the exchanges. According to Staff's recommendation, there is at least one facilities-based wireline carrier and at least one wireless carrier serving Embarq's Ft. Leonard Wood, St. Robert, and Waynesville exchanges who are not affiliated with Embarq but provide basic local phone service to at least two residential customers located within those exchanges. Further, Staff states that the competing carriers have local numbers available for use by residential customers in those exchanges.⁸

In addition, Staff states that there are at least two qualifying carriers serving Embarq's Warrensburg exchange who are not affiliated with Embarq but provide local phone service to business customers in these exchanges.⁹ Staff states that the wireline competitor, Socket, has only one business customer in the Warrensburg exchange.¹⁰ Staff also notes that the wireless carrier for which it attached a supporting affidavit does not distinguish between business and residential customers in the Warrensburg exchange.¹¹ The competing carriers have local numbers available for use by business customers in the Warrensburg exchange.¹²

Staff states that it has no objection to and recommends (1) competitive classification for Embarq's residential services, other than exchange access service, in the Ft. Leonard Wood, St. Robert, and Waynesville exchanges, and (2) competitive classification for Embarq's business services, other than exchange access service, in the Warrensburg exchange. Accordingly, the Staff recommends the Commission allow the substituted tariff sheet to go into effect.

The Commission finds that the facts as submitted in the verified application, as amended, verified Staff recommendation and supporting memorandum, and the related attached materials, all of which are admitted

⁷ *Id.* at paragraph 5.

⁸ Staff Recommendation, page 2, and Appendix A.

⁹ Staff Recommendation, page 2, and Appendix A.

¹⁰ Staff Recommendation, page 2, and Appendix A.

¹¹ Staff Recommendation, page 2, and Appendix A.

¹² Staff Recommendation, page 2, and Appendix A.

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into evidence, are reliable and support the grant of competitive classification in the requested exchanges.

The Commission finds that in the Ft. Leonard Wood, St. Robert, and Waynesville exchanges, facilities-based local voice service is being provided to at least two residential customers by Fidelity I. In addition, the Commission finds that there is at least one non-affiliated wireless services carrier, U.S. Cellular, providing service to residential customers in the Ft. Leonard Wood, St. Robert, and Waynesville exchanges. The Commission further finds that Fidelity and U.S. Cellular have local numbers available for use by residential customers in the Ft. Leonard Wood, St. Robert, and Waynesville exchanges.

The Commission finds that in the Warrensburg exchange, facilities-based local voice service is being provided to business customers by Socket and at least one other facilities-based or wireless carrier.¹³

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law:

The Commission has jurisdiction over this matter pursuant to Section 392.245.5(6), which provides as follows:

Upon request of an incumbent local exchange telecommunications company seeking competitive classification of business service or residential service, or both, the commission shall, within thirty days of the request, determine whether the requisite number of entities are providing basic local telecommunications service to business or residential customers, or both, in an exchange and if so, shall approve tariffs designating all such business or residential services other than exchange access, as competitive within such exchange.

Embarq is an incumbent local exchange telecommunications company and has requested competitive classification of its residential services, other than exchange access service, in its Ft. Leonard Wood, St. Robert, and Waynesville exchanges. Embarq has requested competitive classification of its business services, other than exchange access service, in its Warrensburg exchange.

¹³ Embarq's verified application indicates business customer loss as the result of four facilities-based carriers. In addition, Staff's verified pleading indicates its opinion that at least one wireless carrier, Verizon Wireless, is providing service, though Verizon does not distinguish between residential and business customers.

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Section 392.245.5, provides as follows:

Each telecommunications service offered to business customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to business customers within the exchange. Each telecommunications service offered to residential customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two non-affiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to residential customers within the exchange.

For the purpose of determining whether competitive status is appropriate in an exchange, one commercial mobile service provider can be considered an entity providing "basic local telecommunications services."¹⁴ The statute also requires the Commission to consider as a "basic local telecommunications service provider" any entity providing "local voice service in whole or in part over facilities in which it or one of its affiliates has an ownership interest."¹⁵

Section 392.245.5(3), defines "local voice service" as meaning "[r]egardless of the technology utilized . . . two-way voice service capable of receiving calls from a provider of basic local telecommunications services as defined by subdivision (4) of section 386.020, RSMo 2000."

The statute defines "telecommunications facilities" to include, among other items, "lines, conduits, ducts, poles, wires, cables, receivers, transmitters, instruments, machines, appliances and all devices, real estate, easements, apparatus, property and routes used, operated, controlled or owned by any telecommunications company to facilitate the provision of telecommunications service."¹⁶

Embarq asserts that, other than exchange access services, its residential services in the Ft. Leonard Wood, St. Robert, and Waynesville

¹⁴ Section 392.245.5(1), RSMo Cum. Supp. 2006.

¹⁵ Section 392.245.5(2), RSMo Cum. Supp. 2006.

¹⁶ Section 386.020(52), RSMo 2000.

exchanges, and its business services in the Warrensburg exchange should be classified as competitive. As the party asserting the positive of a proposition, Embarq has the burden of proving that proposition.¹⁷

Because the opportunity for an evidentiary hearing was provided and no proper party requested such a hearing, the Commission may rely on the verified pleadings filed by Embarq and Staff in making its decision in this case.¹⁸

Decision

The undisputed evidence establishes that for residential customers in the Ft. Leonard Wood, St. Robert, and Waynesville exchanges there is at least one non-affiliated entity providing local voice service in whole or in part over facilities in which it, or one of its affiliates, has an ownership interest so as to constitute the provision of basic local telecommunications within the meaning of Section 392.245.5(3). Furthermore, the undisputed evidence establishes that there is at least one non-affiliated wireless carrier providing basic local telecommunications service within the meaning of Section 392.245.5(1) to residential customers in the Ft. Leonard Wood, St. Robert, and Waynesville exchanges. Therefore, the Commission concludes that Embarq's application for competitive classification of its residential services, other than exchange access services, in the Ft. Leonard Wood, St. Robert, and Waynesville exchanges should be granted.

The undisputed evidence establishes that for business customers in the Warrensburg exchange there is at least one non-affiliated entity providing local voice service in whole or in part over facilities in which it, or one of its affiliates, has an ownership interest so as to constitute the provision of basic local telecommunications within the meaning of Section 392.245.5(3). The undisputed evidence also establishes that there is at least one non-affiliated wireless carrier providing basic local telecommunications service within the meaning of Section 392.245.5(1) to business customers in the Warrensburg exchange.

As required by the statute, Embarq submitted tariff changes to implement the competitive classification of its services. That tariff sheet carries an effective date of December 6, 2007. Since the submitted tariff corresponds with the Commission's decision, that tariff will be approved.

¹⁷ *Dycus v. Cross*, 869 S.W.2d 745, 749 (Mo. banc 1994).

¹⁸ See, e.g., *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo. App. W.D. 1989); n.3 *supra*.

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IT IS ORDERED THAT:

1. Embark Missouri, Inc., is granted leave to amend its application.
2. Embark Missouri, Inc.'s residential services, other than exchange access service, are classified as competitive in the Ft. Leonard Wood, St. Robert, and Waynesville exchanges.
3. Embark Missouri, Inc.'s business services, other than exchange access service, are classified as competitive in the Warrensburg exchange.
4. Embark Missouri, Inc.'s proposed tariff revision (Tariff No. YI-2008-0303) is approved as amended to become effective for service on or after December 6, 2007. The tariff sheet approved is:

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5. This order shall become effective on December 6, 2007.

Davis, Chm., Murray, Appling, and
Jarrett, CC., concur.
Clayton, C., concurs; a separate
concurring opinion may follow.

Dippell, Deputy Chief Regulatory Law Judge

CONCURRING OPINION OF COMMISSIONER
ROBERT M. CLAYTON III

This Commissioner concurs in the Order authorizing competitive classification for a number of exchanges in Embark's service territory. Embark's request for reclassification includes three exchanges in which residential service is at issue and one exchange involving business service. This Commissioner concurs in the Order with regard to the residential service as the minimal statutory criteria have been firmly established in the record for Fort Wood, St. Robert and Waynesville. While this Commissioner may have a concern about the real presence of competition in the exchange and the potential that the market will not adequately discipline prices, the statute mandates reclassification and the application should be approved.

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However, this Commissioner must express concern about the business customers located in Warrensburg. The statute authorizing reclassification reads that,

Each telecommunications service offered to business customers, other than exchange access service, of an incumbent local exchange telecommunications company regulated under this section shall be classified as competitive in any exchange in which at least two nonaffiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to business customers within the exchange. (emphasis added) Section 392.245.5, RSMo. 2007.

The statute further reads that,

Upon request of an incumbent local exchange telecommunications company seeking competitive classification of business service or residential service, or both, the commission shall, within thirty days of the request, determine whether the required number of entities are providing basic local telecommunications service to business or residential customers, or both, in an exchange and if so, shall approve tariffs designating all such business or residential services other than exchange access, as competitive within such exchange. (emphasis added) Section 392.245.5(6), RSMo. 2007.

The evidence establishes that wireless service is offered with local number availability or dialing to more than one customer in the exchange. However, the evidence shows that only one customer is served by a competitive wireline provider in the exchange. The statutes cited above mandate that providers must be offering service to customers, meaning more than one customer. Both statutes require the presence of more than a single customer receiving competitive business service. In this case, the evidence presented identifies a single business customer. Because the evidence does

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not firmly establish this minimal element in the grant of competitive classification, business customers of Warrensburg should continue to receive the benefits of some degree of price regulation. Without the presence of providers offering a sufficient level of competition, business customers may be subject to the abuses of an undisciplined and underserved market.

For the foregoing reasons, this Commissioner concurs in part and dissents in part.

In the Matter of Missouri-American Water Company's Tariff Sheets Designed to Implement General Rate Increase for Water and Sewer Service Provided to Customers in the Missouri Service Area of the Company

Case No. WR-2000-281

Decided: December 4, 2007

Water § 16. The Commission determined that a single tariffed rate be retained, but a surcharge be added to the St. Joseph District's rates to ameliorate the effect of the large capital expenditures in the St. Joseph District on the other districts.

Rates § 1. The Commission's decision to move toward district-specific pricing and to apportion the rate increase as it did, is a lawful exercise of the Commission's authority to make decisions based upon record evidence that comport with public policy goals perceived by the Commission to be just and reasonable at the time.

REPORT AND ORDER ON SECOND REMAND

Procedural History

Following decisions by the Circuit Court of Cole County and the Missouri Court of Appeals, this matter again comes before the Commission on remand.¹

On October 15, 1999, Missouri-American Water Company (MAWC or Company) submitted to the Commission its proposed tariff sheets intended to implement a general rate increase For water and sewer service provided to customers in the Missouri service areas of the Company.² The proposed tariffs bore a requested effective date of November 15, 1999. The

¹ St. ex rel. AG Processing, Inc., et al., v. Kevin A. Thompson, 100 S.W.3d 915 (Mo. App., W.D. 2003).

² St. Joseph, Joplin, St. Charles, Warrensburg, Mexico, Parkville, and Brunswick; not including Jefferson City or St. Louis County.

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proposed water service tariffs were designed to produce an annual increase of approximately 53.97 percent (\$16,446,277) in the Company's revenues. The City of Joplin, on behalf of its ratepayers, timely filed for and was granted intervention.

The Missouri Public Service Commission issued its Report and Order in this general rate case on August 31, 2000. After the Commission denied various requests for rehearing, certain parties filed ten petitions for writ of review in three different counties.³ Eventually, the Missouri Supreme Court issued its writ of prohibition, allowing only the seven petitions filed in Cole County to proceed.⁴

The Circuit Court of Cole County took the seven petitions up in two groups, one of four petitions and the other of three.⁵ The Circuit Court entered judgment on the group of four consolidated petitions on May 25, 2001.⁶ It entered judgment on the remaining group of three petitions on September 19, 2001, and amended that judgment on October 3, 2001.⁷ In each judgment, the Circuit Court disposed of some issues on the merits and remanded others to the Commission to provide more extensive findings of fact.

Appeals followed. The Western District of the Missouri Court of Appeals dismissed the appeals on December 13, 2001, holding that the circuit court judgments were not final and thus not subject to appeal. Mandate issued on February 28, 2002.

Thereafter, on May 19, 2003, Missouri-American Water Company filed proposed tariff sheets and initiated a new general rate case, Case No. WR-2003-0500. That case was eventually settled through a series of three unanimous Stipulations and Agreements, which the Commission

³These counties were Cole, Buchanan and Jasper.

⁴*St. ex rel. Public Service Commission v. Dally*, 50 S.W.3d 774 (Mo. banc 2001); *St. ex rel. Public Service Commission v. Jackson*, 50 S.W.3d 250 (Mo. banc 2001). The Cole County petitions were filed first.

⁵Originally, the circuit court did consolidate all seven petitions, but later severed the three filed by the parties that had also filed in Buchanan and Jasper Counties. The group of four petitions included those filed by Missouri-American Water Company, the City of St. Joseph, the Public Counsel, and a group of four public water supply districts: PWSD No. 1 of Andrew County, PWSD No. 2 of Andrew County, PWSD No. 1 of Buchanan County, and PWSD No. 1 of DeKalb County. The group of three petitions included those filed by the City of Joplin, Gilster Mary-Lee Corporation, and a group of three industrial water customers located in St. Joseph, Missouri: AG Processing, Inc., Wire Rope Corporation of America, Inc., and Friskies Petcare, a Division of Nestle USA. The latter three parties shall be referred to herein as the St. Joseph Industrial Intervenors.

⁶Case Nos. 00CV325014, 00CV325196, 00CV325206, and 00CV325218.

⁷Case Nos. 00CV325217, 00CV325220, and 00CV325222.

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approved on April 6, 2004. The associated tariffs became effective on April 21, 2004, superseding the tariffs approved in September of 2000. No party filed a timely Application for Rehearing in Case No. WR-2003-0500.

On May 27, 2004, the Commission issued its Report and Order on [First] Remand. It noted that only three issues were remanded for additional findings of fact and conclusions of law:

1. Whether or not the increased rates should be phased-in to minimize "rate shock";
2. Whether the level of rates for the Joplin District should be increased, decreased, or remain the same;
3. Whether or not larger and smaller distribution mains should be distinguished in the rate design for the St. Joseph District.⁸

The Commission proceeded with an analysis of whether the issues before it were moot, noting:

A case is moot when a tribunal's decision would not have any practical effect upon any live controversy.⁹ Where an event occurs that makes granting effectual relief impossible, the case is moot and generally should be dismissed.¹⁰ This rule applies to contested cases before administrative agencies just as it applies to courts. With respect to utility matters, the general rule is that "issues under old, superseded tariffs are moot and therefore not subject to consideration."¹¹

* * *

The tariffs in question became effective on September 20, 2000, and remained in effect until April 21, 2004, when they were superseded by new tariffs. The Commission is a creature of statute and possesses only such authority as has been affirmatively granted to it by statute. The Commission's ratemaking authority is prospective in nature and the Commission has no power to retroactively phase-in rates. Furthermore, the tariffs in question are no longer in effect. There is no practical action that can be taken by way of correction.

⁸ Report and Order on Remand, issued May 27, 2004; effective June 6, 2004, 12 Mo. P.S.C. 3d 442, 445.

⁹ *State ex rel. Reed v. Reardon*, 41 S.W.3d 470, 473 (Mo. banc 2001).

¹⁰ *Id.*; and see *Armstrong v. Elmore*, 990 S.W.2d 62, 64 (Mo. App., W.D. 1999).

¹¹ *St. ex rel. Missouri Public Service Co. v. Fraas*, 627 S.W.2d 882, 885 (Mo. App., W.D. 1981).

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* * *

As noted, new tariffs became effective on April 21, 2004. Those tariffs provided for a rate decrease in the Joplin District, thus affording prospective relief to Joplin and its citizens. However, there is no lawful possibility of any refund with respect to the monies paid under the tariffs in effect between September 20, 2000, and April 21, 2004.

* * *

The Commission has the authority to determine the rate *to be charged*, § 393.270. In so determining it may consider past excess recovery insofar as this is relevant to its determination of what rate is necessary to provide a just and reasonable return in the future, and so avoid further excess recovery[.] It may not, however, redetermine rates already established and paid without depriving the utility (or the consumer if the rates were originally too low) of his property without due process.

* * *

In the present case, the excess revenue produced by the Joplin District was paid directly to Missouri-American, unconditionally, pursuant to tariffs approved by the Commission. This revenue became the property of Missouri-American and no part of it can lawfully be refunded or returned to the ratepayers. Neither the Commission nor any court can retroactively determine what a just and reasonable rate for Joplin should have been. Therefore, the Commission determines that the Joplin issue is moot. [internal footnotes omitted] *Report and Order on Remand*, *supra* note 8, at 447,448.

Subsequently, the City of Joplin appealed to the Cole County Circuit Court, which affirmed the Commission's decision, and, on December 29, 2004, to the Western District Court of Appeals. On December 6, 2005, the Court reversed the Circuit Court's decision and remanded to the Commission for additional findings of fact and conclusions of law on the single issue of whether the Joplin rates were discriminatory or granted an undue preference. The Court of Appeals found that the matter fell within an exception from the mootness doctrine in that "an issue was presented of a

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recurring nature, is of the general public interest and importance, and will evade appellate review. *Fraas*, 627 S.W.2d at 885.”¹²

Findings of Fact

1. Single-tariff pricing or uniform pricing is a rate design in which all customers within a particular customer class are charged the same rate, regardless of the cost of serving the district in which they reside.¹³

2. The primary goal of a rate design structure is to balance economic efficiency with equity and affordability considerations.¹⁴ The primary goal of a “class” rate design structure is to recover costs from those who cause the costs to be incurred.¹⁵

3. One benefit of single-tariff rate design is protection from price volatility; another is that improvements are more feasible in small districts because their costs are spread over the entire system.¹⁶ However, single-tariff pricing results in rates that do not reflect the actual cost of serving particular customers.¹⁷ Missouri-American’s various districts differ significantly in such cost drivers as water supply source, water treatment process, proximity of the supply source, aggregate demand, and customer density.¹⁸ In district-specific pricing, by contrast, customers pay rates based solely on the actual cost of serving their community.¹⁹

4. By moving toward cost-based rates, the Commission would increase economic efficiency.²⁰

5. The implementation of single-tariff pricing allows subsidization of districts that are too small to ever be truly self-sustaining, and evens out the pricing peaks that would otherwise occur when new facilities are placed in a given district.²¹

6. Maintaining a single tariffed rate allows for the acquisition of troubled water systems in order to improve service to customers.²²

¹² State ex rel. City of Joplin v. PSC of Missouri, 186 S.W.3d 290, 295 (Mo. App., W.D. 2005).

¹³ Busch Direct, at 4.

¹⁴ Busch Rebuttal, at 3.

¹⁵ Hubbs Surrebuttal, at 11-12.

¹⁶ Busch Direct, at 4, 13.

¹⁷ Busch Direct, at 5.

¹⁸ Busch Direct, at 5.

¹⁹ Busch Direct, at 5.

²⁰ Busch Rebuttal, at 3.

²¹ Stout Rebuttal, at 15-17. “Although it may sound corny, helping the little guy is as American as apple pie and is still good public policy. STP promotes such policy. DSP does not.”

²² Stout Rebuttal, at 14.

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Treatment requirements by various level of government are increasing, are almost certain to continue to increase, and bear a cost burden to the water provider.²³

7. The term "rate shock" is used to describe the effect of an extremely large increase in revenue requirement.²⁴

8. District-specific pricing may be in the public interest, but a pure system of district-specific pricing is not in the public interest because it would cause serious rate shock among the consumers in some districts.²⁵

9. A pure district-specific pricing approach in the present case would result in a decrease of 9% in Joplin and increases of 262% in Brunswick, 81% in Mexico, and 68% in Parkville.²⁶ Other districts, specifically St. Charles and Warrensburg, supported the transition to district-specific pricing, as those districts also would have seen a decrease in a pure district-specific pricing approach.²⁷

10. A phase-in plan is any regulatory method that defers the rates intended to recover allowable costs of a newly completed plant beyond the period in which those costs would be charged to expense under generally accepted accounting principles applicable to enterprises in general.²⁸ A phase-in would have the effect of delaying full capital recognition,²⁹ and would necessarily negatively affect the Company's financial statements³⁰ and require that the Company recognize a loss in any period full recovery is not provided.³¹

A phase-in of higher rates to districts with higher costs would result in an even greater rate increase because of the associated carrying charges.³² Such a phase-in of rate increases would take "an extremely long time and force citizens in the smaller districts to pay a lot more in rates due to the added carrying costs that [the] Company would be allowed to collect."³³

²³ Stout Rebuttal, at 13.

²⁴ Rackers Direct, at 11.

²⁵ Busch Direct, at 7.

²⁶ Busch Surrebuttal, at 3-4.

²⁷ However, the reduction of rates to those other districts is not at issue here in that only the question of rates prejudicial to Joplin has been remanded. See the *Initial Report and Order* in this matter, issued August 31, 2000, at 24.

²⁸ Hamilton Surrebuttal, at 8.

²⁹ Hamilton Surrebuttal, at 3.

³⁰ Hamilton Surrebuttal, at 3, 6. Rackers Surrebuttal, at 4.

³¹ Hamilton Surrebuttal, at 4, 9.

³² Tr. 795-796.

³³ Busch Surrebuttal, at 5.

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A phase-in of rates, increasing overall costs and having a negative effect on the Company's financial statements is not in the public interest.

11. Single tariff pricing may be in the public interest, but a pure system of single tariff pricing is not in the public interest because it would unreasonably burden consumers in some districts with costs of facilities in districts that provide no benefit to them.³⁴

12. In the present case, such a burden would occur because of the installation of costly facilities in St. Joseph. It is reasonable to retain single tariff pricing, with a system-wide increase in rates solely as the result of the St. Joseph plant limited to 15 or 20%, with the remainder to be added to the total bill of St. Joseph customers in the form of a surcharge of fixed duration.³⁵

13. Use of the single tariff pricing with surcharge model would reduce the proposed rate increase from 48% to 28% for the other (non-St. Joseph) districts, using a 15% limitation. The St. Joseph surcharge would be 48.3%, resulting in an overall increase in St. Joseph revenues of 89.63%. The same model would reduce the proposed rate increase from 48% to 33% for the other districts, using a 20% limitation. The St. Joseph surcharge would be 34.8%, resulting in an overall increase in St. Joseph revenues of 79.35%.³⁶

14. The cost of service is simply a guide used to set rates.³⁷ A just and reasonable rate, under the circumstances of this case, is one that moves away from single-tariff pricing, but tries to mitigate the resulting rate shock.³⁸ One way to accomplish such a result is for "no district [to] receive a decrease in rates when another district is receiving an increase. Any extra revenues collected from districts paying more than their cost of service [should] be allocated to the smaller districts in a way that balances the rate increases among those [under-recovering] districts."³⁹

15. The Joplin district produces revenue substantially in excess of its cost of service, and has done so since Missouri-American's last rate case.⁴⁰

16. Holding the Joplin district at current rates is reasonable to help offset the increases to the citizens of Brunswick, Mexico and Parkville.⁴¹

³⁴ Stout Rebuttal, at 18..

³⁵ Stout Rebuttal, at 19.

³⁶ Stout Rebuttal, at 19.

³⁷ Busch Direct, at 7.

³⁸ Busch Direct, at 7.

³⁹ Busch Direct, at 8.

⁴⁰ Harwig Direct (Ex. 57), at 11.

⁴¹ Busch Surrebuttal, at 7.

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17. Irrespective of the revenue generated by the Joplin district, a just and reasonable rate, under the circumstances of this case, is one that retains single-tariff pricing, but tries to mitigate the resulting rate impact to districts not directly causing increases in cost, by means of a surcharge.⁴²

18. Increasing the Joplin District's rates by 28% to 33% would be reasonable.⁴³

Conclusions of Law

1. Section 393.130.1. RSMo 2000 provides that every water corporation shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such water corporation for water or any service rendered or to be rendered shall be just and reasonable and not more than allowed by law or by order or decision of the commission. Every unjust or unreasonable charge made or demanded for ... such service, or in connection therewith, or in excess of that allowed by law or by order or decision of the commission is prohibited.

2. Section 393.130.2. provides that no water corporation shall directly or indirectly by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for water or for any service rendered or to be rendered or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.

3. Section 393.130.3. provides that no water corporation shall make or grant any undue or unreasonable preference or advantage to any person, corporation or **locality**, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. [emphasis added]

4. Prior to the Commission's Report and Order in this case, the rates and charges applied to Missouri-American's Joplin customers were the same rates charged to other Missouri-American ratepayers of the same class (e.g., residential, commercial) regardless of the location of the

⁴² Stout Surrebuttal, at 6-7.

⁴³ Stout Rebuttal, at 16.

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customer of the district in which they were served. This “single tariff pricing” model was lawfully in effect and is presumed to be just and reasonable.⁴⁴ Under single tariff pricing no customer in a given class is charged more or less than any other customer in that class, excepting for varying levels of consumption. The Commission concludes that the rates existing at the time this case was filed were both just and reasonable, and complied with §393.130.

5. Section 393.150.1. provides that whenever a water corporation files any schedule stating a new rate or charge, or any new practice relating to any rate, charge or service, the commission has authority to suspend the operation of such schedule and defer the use of such rate, charge, form of contract or agreement, rule, regulation or practice until it can conduct a hearing concerning the propriety thereof. After hearing, the commission may make such order in reference to such rate, charge or practice as would be proper.

6. Missouri American filed for an increase in rates, resulting in the Company’s demonstration, at a full hearing on the merits, that the Company was entitled to an overall revenue increase. The Commission concludes that the overall revenue increase was reasonable and complied with §393.150.

7. Section 393.140(11) provides that the commission shall have power to require every...water corporation... to [make public] all rates and charges made... by such ... water corporation [...]. Unless the commission otherwise orders, no change shall be made in any...rate, charge or service [...]. No corporation shall charge...a greater or less or different compensation for any service...than the rates and charges...specified in its schedule filed and in effect at the time; nor shall any corporation...extend to any person or corporation any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are regularly and uniformly extended to all persons and corporations under like circumstances [...].

8. In the course of the hearing, parties successfully demonstrated that moving from statewide average pricing to district-specific pricing would increase the correlation of rates and costs, increase economic efficiencies, and send more appropriate pricing signals to customers. In addition, it would not be discriminatory under §393.130.3, though that section

⁴⁴ See *State ex rel. Sprint Spectrum L.P. v. Missouri Public Service Com’n*, 112 S.W.3d 20 (Mo.App. W.D.,2003). “The ... rates had been approved by the Commission in prior proceedings and were, therefore, presumed lawful and reasonable.” See also §386.270 RSMo 2000.

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precludes charging customers in different localities different rates, because it falls within the exception set forth in §393.140(11), which allows different classes of customers to be charged different rates as long as the rates are consistent among “like,” or similarly situated, customers. Increasing the relationship between costs and rates is a rational and fair component in rate setting and, in this case, the Commission concludes that its approval of district-specific pricing comports with §393.140(11).⁴⁵

9. In moving to a pricing system in which cost causers are cost payers, a perfect correlation will never be achieved. Any time a ratepayer pays an average rate, the correlation between cost and rates will be imperfect, because no two ratepayers are exactly similarly situated. The Commission attempts to remedy this disparity by grouping customers into classes that have similar costs because they have similar usage patterns. It is an imperfect solution, as the Western District Court of Appeals notes:

As we stated in *Associated Natural Gas*, “the Commission [can] select its methodology in determining rates and make pragmatic adjustments called for by particular circumstances.” 706 SW2d at 879-80. See also *Missourians for Tax Justice Educ. Project v. Holden*, 959 SW2d 100, 104-05 (Mo. Banc 1997), cert.denied, 524 US 916, 118 S.Ct.2298, 141 L.Ed.2d 158 (1998) (“[T]he existence of another, even more mathematically precise method of achieving the constitution’s purposes does not render the chosen method irrational for equal protection purposes. ‘[R]ational distinctions may be made with substantially less than mathematical exactitude.’ *New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976)”).

In this case, having determined that it was reasonably necessary to keep the existing rates in districts in which rates exceeded costs in order to prevent rate shock in the under-recovering districts, the Commission did not treat Joplin any differently than the other over-recovering districts. To do so would indeed have been discriminatory, in that similarly situated districts would be inconsistently treated. The Commission concludes that keeping the pre-existing rates for those districts, including Joplin, but apportioning all of the total company revenue increase to the under-recovering districts is

⁴⁵ Classification of users or consumers of water by the Public Service Commission, to be valid, must comport with the rule or principle of sound legislative classification. *State ex.rel. Laundry, Inc. v. PSC*, 34 SW 2d (1931). Increasing the correlation between cost causing and cost-paying is a rational, valid basis for classification.

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fair in both calculation⁴⁶ and result⁴⁷ and constitutes just such a “pragmatic adjustment” as the Western District Court envisioned. As the Missouri Supreme Court noted, “[I]t is not methodology or theory but the impact of the rate order which counts in determining whether rates are just, reasonable, lawful, and non-discriminating.”⁴⁸

10. In the course of the hearing, parties also successfully demonstrated that retaining statewide average pricing, with the addition of surcharges as described, would increase the willingness of large companies to take over troubled systems to increase the quality of service to that system’s customers, would protect customers from unreasonable rates in districts too small to be self-sustaining in the long run, and would protect customers from undue price volatility in districts in which new facilities are placed. Single-tariff pricing is not discriminatory under §393.130.3. Although that section precludes charging customers in different localities different rates, the proposed surcharge for St. Joseph ratepayers falls within the exception set forth in §393.140(11), which allows different classes of customers to be charged different rates as long as the rates are consistent among “like,” or similarly situated, customers. Increasing the relationship between costs and rates is a rational and fair component in rate setting and, in this case, the Commission concludes that it could have approved single-tariff pricing with additional surcharges in the St. Joseph District and still complied with §393.140(11).

11. The Commission concludes that the rates paid by Joplin ratepayers prior to the Report and Order in this case were lawful and not discriminatory.⁴⁹ They did not become discriminatory because they were not reduced, while rates in other districts increased. They did not become discriminatory even though it was demonstrated in the case that Joplin (along with some other districts) contributes more in revenue to the statewide system than it costs to provide service, as that was true of the rates prior to this case. Joplin was not singled out to receive no reduction – no district received a reduction. Therefore, the Commission concludes that the rates charged to Joplin ratepayers in this matter are fair and reasonable and do not discriminate against Joplin ratepayers.

⁴⁶ It is within the province of the Commission to determine the methodology used for ratemaking. *Missouri Gas Energy v. Mo. PSC*, 978 SW2d 434,440 (MoApp, WD 1998); *State ex. rel. Associated Natural Gas v. Mo. PSC*, 706 SW2d 870, 880-82 (MoApp, WD 1985).

⁴⁷ The Commission has broad discretion... (p58 orig order)

⁴⁸ Note 37, *Infra* at 879.

⁴⁹ Rates approved by the Commission acquire the force of law. *State ex. rel. St. Louis County Gas Co. v. Mo. PSC*, 286 SW 84 (1926); *id* at note 37.

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Discussion

The Commission is charged with enforcement of §393.130 RSMo 2000, which in the first subsection requires that companies that provide utility service, including water service, provide safe and adequate service at just and reasonable rates. The section goes on to give the Commission the authority to determine what that reasonable rate should be and prohibits a utility from charging any rate in excess of the Commission-determined rate. The second subsection prohibits the utility company from charging any customer a different amount for receipt of the service than any other customer, except as provided elsewhere in the chapter.

Section 393.140(11), refines that requirement by stating that companies must charge the same rate to all customers who are “under like circumstances.” For purposes of this discussion then, we must begin the analysis of whether the Joplin ratepayers are discriminated against because they are **not** charged a uniform, company-wide rate, but are properly charged a different rate because they are not “under like circumstances.”

Immediately prior to this case, each class of Missouri-American’s ratepayers was charged a single, average, state-wide rate.⁵⁰ However, it does not cost the same amount to provide service to customers across the state. In fact, the evidence in the case showed that there is a great disparity in the costs of providing service among the various districts Missouri-American served. The Commission decided that in order for rates to be just, there should be a relationship between rates and costs, and that moving to district-specific pricing was necessary to achieve that goal.

The Commission is charged not only with setting just rates, but reasonable rates. The rates must not only comport with the dictates of fundamental fairness, but also should be as reasonably priced as possible (while allowing cost recovery and a reasonable return) so as to keep safe and adequate service within the reach of as many ratepayers as possible. In this matter, the evidence showed that moving to unmitigated district-specific pricing would result in unreasonable rates in some districts. The evidence showed that the ratepayers in Joplin were paying rates higher than the cost of supplying service to them. They asserted that their rates should be reduced. The evidence showed that a rate reduction to Joplin ratepayers would result in unreasonable rates in other districts and the evidence did not show that the rates in Joplin prior to the case (and

⁵⁰ Prior to this case, the company’s rates had been moving toward a single tariffed rate, achieved only recently before this case was filed.

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continued unchanged) were unreasonable. For that reason, the Commission did not reduce the rates for Joplin, but did not apportion to Joplin any of the overall rate increase granted to Missouri-American.

The Commission acted lawfully in determining that district-specific pricing was appropriate, and acted lawfully in apportioning the rate increase as it did. The Commission did not unlawfully discriminate against Joplin or the other "over-earning" districts by apportioning no rate increase to those districts, but not granting them a rate decrease.

Although the Commission acted lawfully, it is this Commission's opinion that the decision to move from single tariff pricing to district-specific pricing may be revisited in future cases as a matter of regulatory policy. Although assigning costs to the cost causer is generally a sound tenet, there are times when it cannot be reasonably applied. In instances in which the capital expenditures are necessarily huge and the customer base from whom the utility must recover its cost is tiny, enlarging the contributing customer base may be the only reasonable approach. This Commission does not believe that cost causation and cost recovery should be entirely unrelated in rates, but that they cannot always be directly related, if fair and reasonable rates are to be achieved. Moreover, as the evidence in this case showed, increasing environmental regulation of water and sewer companies and rising water quality standards are intensifying the difficulty for small systems to function independently. As those small systems fail, the Commission looks to larger systems to take over the troubled ones. The use of district-specific pricing serves as a significant impediment to incorporating troubled systems into well-operated systems.

In this matter, Missouri-American proposed that the single tariffed rate be retained, but a surcharge be added to the St. Joseph District's rates to ameliorate the effect of the large capital expenditures in the St. Joseph District on the other districts. This approach is much more conducive to the long-term operability of the water system, providing the most consistently high quality water service at reasonable, and reasonably stable, rates. Nevertheless, the Commission's decision to move toward district-specific pricing and to apportion the rate increase as it did was a lawful exercise of the Commission's authority to make decisions based upon record evidence that comport with public policy goals perceived by the Commission to be just and reasonable at the time.

IT IS ORDERED THAT:

1. This Order shall be effective on December 14, 2007.
2. This case may be closed on December 15, 2007.

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Davis, Chm., Murray, Clayton,
Appling, and Jarrett, CC., concur;
and certify compliance with the
provisions of Section 556.080, RSMo 2000.

Dale, Chief Regulatory Law Judge

**In the Matter of CenturyTel of Missouri, LLC, and Spectra
Communications Group, LLC, d/b/a CenturyTel Tariff Filings to
Grandfather Remote Call Forward Services to Existing Customers and
Existing Locations**

Case No. TC-2007-0307

Decided: December 4, 2007

Telecommunications § 1. The Commission rejected tariff sheets submitted on January 19, 2007, by CenturyTel of Missouri, LLC and Spectra Communications Group, LLC, d/b/a CenturyTel. The Commission further ordered that CenturyTel of Missouri, LLC and Spectra Communications Group, LLC are to fulfill all pending retail and resale orders for remote call forwarding service for Socket Internet and Socket Telecom, LLC.

Appearances

William K. Haas, Deputy General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

Carl J. Lumley and Leland B. Curtis, Curtis, Heinz, Garrett & O'Keefe, P.C., 130 South Bemiston, Suite 200, St. Louis, Missouri 63105, for Socket Telecom, LLC and Socket Holdings Corporation, d/b/a Socket Internet.

Larry S. Dority, Fischer & Dority, P.C., 101 Madison, Suite 400, Jefferson City, Missouri 65101, for CenturyTel of Missouri, LLC and Spectra Communications Group, LLC, d/b/a CenturyTel.

**REGULATORY LAW JUDGE: Morris L. Woodruff, Deputy Chief
Regulatory Law Judge**

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REPORT AND ORDER

Syllabus: The Commission orders CenturyTel to fill Socket Internet's February 2007 order for additional remote call forwarding service. The Commission also rejects CenturyTel's tariffs that would restrict the future provision of its remote call forwarding service.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Procedural History

On January 19, 2007, CenturyTel of Missouri, LLC, and Spectra Communications Group, LLC, d/b/a CenturyTel filed separate, but essentially identical, tariffs that would "grandfather" the Remote Call Forwarding service offered by the two companies. CenturyTel of Missouri's tariff was assigned tariff number JI-2007-0498 and Spectra's tariff was assigned tariff number JI-2007-0499.¹ The tariffs carried a February 18 effective date.

On February 14, Socket Telecom, LLC, and Socket Holdings Corporation, d/b/a Socket Internet, filed a motion asking the Commission to suspend or reject the CenturyTel tariffs. The Commission's Staff responded on February 14 with a recommendation that the Commission suspend the CenturyTel tariffs to permit further investigation of Socket Telecom and Socket Internet's allegations. CenturyTel responded on February 15 with a pleading opposing Socket Telecom and Socket Internet's motion to suspend or reject the tariffs. On February 15, the Commission issued an order suspending CenturyTel's tariffs until December 18.

The Commission established a procedural schedule that required the parties to prefile direct, rebuttal, and surrebuttal testimony. The Commission scheduled an evidentiary hearing for the purpose of cross-examination of those witnesses on August 27 and 28. In response to joint motions of the parties, the Commission initially rescheduled the hearing for

¹ CenturyTel of Missouri and Spectra are legally distinct entities, but, for purposes of this Report and Order, the Commission will refer to them collectively as CenturyTel.

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September 18 and 19, and then for October 18 and 19. Ultimately, the parties agreed to waive their right to cross-examine the witnesses and asked the Commission to cancel the hearing. With the agreement of the parties, the Commission admitted the prefiled written testimony into evidence and cancelled the hearing. The parties filed briefs on October 31.

CenturyTel's Remote Call Forwarding Service

CenturyTel of Missouri and Spectra Communications Group, d/b/a CenturyTel are incumbent local exchange companies offering telephone services in specified Missouri exchanges under authority granted and tariffs approved by this Commission. The Remote Call Forwarding (RCF) Service currently offered by CenturyTel is a local switch-based telephone number forwarding service. The customer purchasing the RCF service has no telephone equipment associated with the telephone number assigned to them by CenturyTel. Instead, any telephone call to that number terminates in the CenturyTel switch, which automatically forwards the call to the distant telephone equipment specified by the purchaser of RCF service. The RCF service is typically used by a business that wants to provide a local number for its customers to call without actually having a physical presence in that area.² So, for example, a business based in Centralia, Missouri might believe that it will get more business from customers in Columbia if the Columbia customers can reach the business by dialing a Columbia phone number. The Centralia business could achieve that result by purchasing RCF service from CenturyTel. In that way, the Columbia customers would avoid toll charges in calling the Centralia business. Furthermore, the Centralia business would appear to have a local presence in Columbia, a useful illusion that would not occur if the business simply purchased the use of a toll-free, 1-800 number.³

Socket's Actions Regarding CenturyTel's RCF Service

The other parties to the dispute regarding CenturyTel's RCF service are two affiliated companies, Socket Telecom and Socket Internet. Socket Telecom is an authorized provider of intrastate switched and non-switched local exchange and interexchange telecommunications services in Missouri under certificates granted and tariffs approved by this Commission. Socket Telecom is a competitive local exchange company offering local phone service in competition with CenturyTel. Socket Holdings Corporation owns

² Martinez Direct, Ex. 2, Pages 4-5, Lines 22-23, 1-6.

³ Kohly Direct, Ex. 1, Page 17, Lines 7-16.

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Socket Telecom, and also does business as Socket Internet. Socket Internet is an internet service provider offering its services in Missouri.⁴

In October 2006, Socket Internet purchased 39 RCF service arrangements from CenturyTel in various exchanges around Missouri.⁵ Socket Internet paid CenturyTel its tariffed rates for the RCF service.⁶ Thereafter, Socket Internet changed service providers to start taking an RCF-like service from its affiliate, Socket Telecom.⁷ At Socket Internet's request, Socket Telecom ported the phone numbers that Socket Internet had obtained from CenturyTel so that Socket Internet could continue to use those numbers while taking service from Socket Telecom.⁸

As an internet service provider, Socket Internet offers dial-up internet service to its customers. Socket Internet intended to use the RCF service numbers it obtained from CenturyTel to offer its customers the ability to establish a data connection to the internet while making a local, non-toll, call. CenturyTel's tariff regarding RCF service provides that RCF service is not suitable for transmission of data. It also provides that RCF service cannot be used for toll by-pass, and can be used to forward only one call at a time.⁹ Socket Internet intended to avoid the restrictions in CenturyTel's tariff by porting the number it obtained from CenturyTel to Socket Telecom. It then used Socket Telecom's RCF-like foreign exchange service to provide dial-up internet service to its customers.

CenturyTel's Tariff to Grandfather RCF Service and Socket Internet's Response

CenturyTel reluctantly completed all of Socket Internet's October 2006 RCF number port orders.¹⁰ However, on January 19, 2007, CenturyTel filed tariffs that would "grandfather" its RCF service. CenturyTel's tariff revisions would limit its RCF service to "existing customers at existing locations". It provides that no new service will be offered.¹¹ CenturyTel gave those tariffs a thirty-day effective date of February 18. However, on February 15, the Commission suspended the tariffs before they could go into effect.

⁴ Kohly Direct, Ex. 1, Page 3, Lines 7-18.

⁵ Kohly Direct, Ex. 1, Page 12, Lines 20-21.

⁶ Kohly Direct, Ex. 1, Page 13, Lines 9-11.

⁷ Socket Internet purchases a "DS3 Service with the Out of Calling Scope Option" from Socket Telecom. Kohly Direct, Ex. 1, Page 6, Lines 5-6.

⁸ Kohly Direct, Ex. 1, Pages 12-13, Lines 21-22, 1.

⁹ Martinez Direct, Ex. 2, Pages 5-7, Lines 10-21, 1-22, 1-2., *a/s/o*, Schedule APM #1.

¹⁰ Kohly Direct, Ex. 1, Page 13, Lines 1-11.

¹¹ Commission Tariff File Nos. JI-2007-0498 and JI-2007-0499.

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On February 8, Socket Internet placed an order for 61 additional RCF numbers from CenturyTel.¹² Claiming that Socket Internet's request for additional RCF numbers would violate its existing tariff and "interfere with and impede CenturyTel's ability to provide service to other customers", CenturyTel refused to fill that order.¹³

The Issues

Two issues are presented for the Commission's determination. First is the relatively narrow issue of whether CenturyTel should be required to fill Socket Internet's February order for 61 additional RCF service arrangements. The second issue is the broader question of whether the Commission should approve CenturyTel's tariffs that would "grandfather" its RCF service offerings by limiting those offerings to existing customers.

Should CenturyTel be Required to Fill Socket Internet's February Order for Additional RCF Service?

CenturyTel's tariff that would "grandfather" its RCF service offerings clearly was not in effect on February 8, when Socket Internet submitted its request for additional service. Therefore, CenturyTel would be justified in refusing to supply that service only if Socket Internet's use of RCF service would violate CenturyTel's preexisting tariff.

CenturyTel claims that it can refuse to honor Socket Internet's request because that company intended to use the CenturyTel numbers that it obtained through its RCF service orders to provide multi-channel services for the provision of dial-up internet service. CenturyTel contends such a use of its numbers would overload its network to the clear detriment of CenturyTel's other customers.¹⁴ Socket Internet concedes that it intends to use the numbers it obtains from CenturyTel to provision dial-up internet service but denies that its actions would violate CenturyTel's tariffs or overload its network. The Commission finds that Socket Internet is correct.

The key to understanding the dispute between CenturyTel and Socket Internet is to realize that Socket Internet could purchase everything it needs to provision dial-up internet service to its customers directly from Socket Telecom without porting any numbers from CenturyTel. Socket Telecom can obtain its own numbering resources in CenturyTel's exchanges and can, and indeed does, offer its own RCF-like service to

¹² Kohly Direct, Ex. 1, Page 5, Lines 20-21.

¹³ Martinez Direct, Ex. 2, Page 12, Lines 15-19.

¹⁴ Martinez Direct, Ex. 2, Page 13, Lines 5-8.

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Socket Internet and other customers.¹⁵ Why then does Socket Internet want to obtain those numbers from CenturyTel? And why does CenturyTel want to prevent Socket Internet from obtaining the numbers it seeks?

The answer is competition. In the small, rural exchanges in which Socket Internet is seeking to obtain internet customers, CenturyTel, as the incumbent local exchange carrier, controls the NXX code that has, for many years, been used for dialing local calls. So, for example, a customer in the St. James exchange would recognize 573-265-xxxx as a local number. Socket Telecom also controls a block of numbers in the St. James exchange, but a number assigned to a customer by Socket Telecom would include a 899 prefix, such as 573-899-xxxx. Socket Internet is concerned that its customers in the St. James exchange might not recognize that the 899 number is indeed a local number and that confusion could result.¹⁶ Indeed, a customer could mistakenly dial a 1 before the unfamiliar local number and thereby incur toll charges on their dial-up connection.¹⁷ By obtaining a familiar local number from CenturyTel and then exercising its right to port that number to Socket Telecom,¹⁸ Socket Internet establishes a means by which its customers can dial a familiar number to obtain internet service.

CenturyTel argues that it should be able to deny Socket Internet's request for RCF service because its planned use for those numbers would violate CenturyTel's tariff and would overload its system with multiple calls transmitting data to and from the internet. However, CenturyTel did not demonstrate any violation of its tariffs. On the contrary, while using the RCF service it obtained from CenturyTel, before switching service to Socket Telecom and porting the number, Socket Internet complied with all requirements of CenturyTel's tariff.¹⁹ CenturyTel presented no evidence to show that Socket Internet has not complied with its tariffs. Indeed, CenturyTel's witness stated that when Socket Internet has requested RCF service in the past it has directed that the RCF number be forwarded to a

¹⁵ Martinez Direct, Ex. 2, Pages 13-14, Lines 20-23, 1-2.

¹⁶ Kohly Direct, Ex. 1, Page 7, Lines 3-17.

¹⁷ Kohly Direct, Ex. 1, Pages 7-8, Lines 18-20, 1-8.

¹⁸ In a recent arbitration decision, the Commission required the interconnection agreement between Socket and CenturyTel to include a provision permitting the porting of telephone numbers associated with remote call forwarding. Voight Rebuttal, Ex. 5, Page 6, Lines 5-10. That obligation is found in Article XII, Section 6.2.2 of the interconnection agreement. Kohly Rebuttal, Ex. 4, Page 7, Lines 14-18.

¹⁹ Kohly Direct, Ex. 1, Page 11, Lines 13-18.

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number used for customer service or technical support.²⁰ That witness concedes that such use of the RCF service is appropriate.²¹

CenturyTel concern about Socket Internet's intentions does not start until after Socket Internet has switched its service and had the number ported to Socket Telecom. After that change is made, Socket Internet intends to use the ported number to provide its customers with dial-up internet access. CenturyTel complains that this use of the ported number would be inconsistent with its tariff and could cause congestion on its system. However, once Socket Internet has switched service providers to take service from Socket Telecom it must comply with Socket Telecom's tariffs, and is no longer bound by the terms of CenturyTel's tariffs.

The internet dial-up calls made by Socket Internet customers would be transported over CenturyTel's lines so CenturyTel has some basis for its concerns about congestion. However, that traffic will flow over the network in exactly the same manner whether Socket Internet is allowed to obtain and port an RCF number from CenturyTel or obtains a number directly from Socket Telecom.²² Furthermore, once Socket Internet switches its service to Socket Telecom, Socket Telecom is the party responsible for the flow of traffic. As a result, CenturyTel's concerns about congestion are properly addressed to Socket Telecom, not Socket Internet.

Socket Telecom and CenturyTel have interconnection agreements in place that include provisions to deal with the potential congestion problems identified by CenturyTel. If CenturyTel is concerned about congestion problems, its remedy may be found in those interconnection agreements. However, CenturyTel's concerns about potential congestion problems are not a basis for refusing to honor Socket Internet's order for additional RCF connections.

Socket Internet's request for additional RCF connections complies with the requirements of CenturyTel's tariffs and the Commission will order CenturyTel to honor those requests.

Should the Commission Approve CenturyTel's Tariffs that Would "Grandfather" its RCF Service?

As previously indicated, CenturyTel has proposed tariffs that would limit its offering of RCF service to existing customers at existing locations. If the tariffs are approved, CenturyTel would not offer any new RCF service. Obviously, the tariff revisions are related to CenturyTel's dispute with Socket Internet and Socket Telecom. If the tariffs were approved,

²⁰ Martinez Direct, Ex. 2, Page 10, Lines 7-12.

²¹ Martinez Direct, Ex. 2, Page 12, Lines 3-7.

²² Kohly Surrebuttal, Ex. 8, Page 11, Lines 11-14.

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CenturyTel would not have to honor any new orders from Socket Internet for RCF service to obtain numbers to be ported to Socket Telecom. The Commission has already found that Socket Internet's practices do not violate CenturyTel's current tariffs, but the question of whether CenturyTel should be allowed to change its tariffs is legally distinct and must be separately addressed.

In support of its tariffs, CenturyTel contends that it should be allowed to restrict its offering of RCF service to reduce the risk of enabling the fraudulent avoidance of toll charges. In part, CenturyTel bases this argument on its contention that Socket Internet is engaging in such fraudulent activity. The Commission has already addressed that contention. CenturyTel also cites an incident at a Washington state prison in which prisoners used stolen social security numbers and a false billing address to set up an inappropriate RCF service that cost CenturyTel \$600,000. That scam was the rationale for CenturyTel's decision to "grandfather" its RCF service in that state in 2005.²³ CenturyTel did not offer any evidence to demonstrate that its RCF service in Missouri has been subject to a similar scam.

CenturyTel also contends that RCF service is not really an important service and its decision not to offer that service to new customers would not harm the public interest. In support of that argument, CenturyTel points out that only one half of one percent of CenturyTel's Missouri customers purchase RCF service.²⁴ Furthermore, CenturyTel argues that RCF is becoming an antiquated service for which alternative services would remain available.²⁵

The expert testimony offered by Staff reaches a different conclusion about the continued utility of CenturyTel's RCF service. Staff's witness, William L. Voight explained that RCF service could be very useful in response to natural or man-made disasters. For example, a tornado could destroy a home or business, forcing the family or business to temporarily relocate. RCF service would allow a customer to retain the same phone number and have calls to that number redirected to another location. Unlike standard versions of call forwarding service, a unique feature of RCF service is that customer premise equipment is not required to make the service function properly.²⁶ The Commission accepts the expert opinion of Staff's witness that "[t]his unique characteristic of *Remote Call Forwarding*

²³ Martinez Direct, Ex. 2, Page 8, Lines 2-10.

²⁴ Martinez Direct, Ex. 2, Page 14, Lines 17-18.

²⁵ Martinez Direct, Ex. 2, Page 14, Line 9.

²⁶ Voight Rebuttal, Ex. 5, Pages 2-3, Lines 18-23, 1-2.

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makes the service indispensable for emergency and disaster contingency planning purposes.”²⁷ Based on Voight’s impartial expert opinion, the Commission finds that “there is no close substitute for Remote Call Forwarding telephone service.”²⁸

Finally, CenturyTel argues that the Commission has no authority to interfere with its decision to “grandfather” its RCF service because that service is not “a technology or service feature constituting the minimum elements necessary for basic local and interexchange telecommunications service.”²⁹ In other words, CenturyTel is claiming the right to manage its business affairs in whatever way it deems appropriate.

As a public utility, CenturyTel has an obligation to “furnish and provide with respect to its business such instrumentalities and facilities as shall be adequate and in all respects just and reasonable.”³⁰ RCF is a well-established and useful service that benefits CenturyTel’s customers. The primary reason CenturyTel wants to limit the future availability of that service is to erect barriers in front of its competitor. The Commission will not approve tariffs that would limit the availability of a service that is necessary to provide adequate and just and reasonable service to CenturyTel’s customers.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law:

1. CenturyTel of Missouri, LLC, and Spectra Communications Group, LLC, d/b/a CenturyTel are “Telecommunications Companies” and “Public Utilities,” as those terms are defined at Subsections 386.020 (51) and (42), RSMo Supp. 2006. As such, they are subject to regulation by this Commission.

2. Section 392.200.1, RSMo Supp. 2006 states:
Every telecommunications company shall furnish and provide with respect to its business such instrumentalities and facilities as shall be adequate and in all respects just and reasonable.

²⁷ Voight Rebuttal, Ex. 5, Page 3, Lines 2-3.

²⁸ Voight Rebuttal, Ex. 5, Page 3, Lines 3-4.

²⁹ Joint Brief of CenturyTel of Missouri, LLC and Spectra Communications Group, LLC, d/b/a CenturyTel, Page 6.

³⁰ Section 392.200.1, RSMo Supp. 2006.

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3. Section 392.200 RSMo 2000 requires telecommunications companies to file tariffs with the Commission establishing the services they will offer and the rates they will charge for those services.

DECISION

Based on the facts as it has found them, and its conclusions of law, the Commission finds that CenturyTel is obligated under its existing tariff to fill Socket Internet's February 2007 order for additional RCF service. Furthermore, the Commission finds that CenturyTel's proposed tariffs "grandfathering" its RCF service are not in the public interest and must be rejected.

Pending Motion to Strike Portions of CenturyTel's Brief

On November 7, Socket Telecom and Socket Internet filed a motion urging the Commission to strike specified portions of CenturyTel's brief that Socket contends are unfounded and inappropriate. No party has responded to Socket's motion.

The Commission agrees with Socket that its decision must be based on the evidence in the record before it. CenturyTel's brief is not evidence and to the extent that it contains references to material that is not in evidence, the Commission has not relied on that material in making its decision. There is, however, no need to strike any portion of CenturyTel's brief. Socket's motion will be denied.

IT IS ORDERED THAT:

1. The proposed tariff sheets (JI-2007-0498) submitted on January 19, 2007, by CenturyTel of Missouri, LLC, are rejected.
2. The proposed tariff sheets (JI-2007-0499) submitted on January 19, 2007, by Spectra Communications Group, LLC, d/b/a CenturyTel, are rejected.
3. CenturyTel of Missouri, LLC, and Spectra Communications Group, LLC, d/b/a CenturyTel are ordered to fulfill all pending retail orders for remote call forwarding service for Socket Internet.
4. CenturyTel of Missouri, LLC, and Spectra Communications Group, LLC, d/b/a CenturyTel are ordered to fulfill all pending resale orders for remote call forwarding service for Socket Telecom, LLC.
5. Socket Telecom, LLC and Socket Internet's Motion to Strike Portions of CenturyTel's Brief is denied.
6. This Report and Order shall become effective on December 14, 2007.

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Davis, Chm., Clayton, Appling, and Jarrett, CC., concur;
Murray, C., dissents with separate dissenting opinion to follow;
and certify compliance with the provisions
of Section 536.080, RSMo.

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

I must dissent from the majority's decision to adopt the Report and Order issued on December 4, 2007, primarily in regard to disallowance of grandfathering of the RCF service only to current subscribers. In my opinion, the majority of the Commission has likely exceeded its statutory authority and certainly has set a chilling regulatory policy of requiring utilities to continue the provision of non-essential services when no law or regulation requires such.

The question of whether Socket Telecom and/or Socket Internet intend to misuse CenturyTel's existing RCF tariff is much more complicated. If a misuse occurs, a remedy is available through the complaint process before this Commission. The same is true if either CenturyTel or Socket violates the terms of the interconnection agreement. Those are separate questions that would have to be addressed with different evidence than the parties presented in this proceeding. I do not, therefore, disagree with requiring CenturyTel to fill the RCF orders placed while a change in its tariff was pending.

In terms of CenturyTel's application to change its tariff, one must first determine what legal basis, if any, the Commission has to prevent the grandfathering tariffs from going into effect. Second, if such a basis exists, what public policy would be advanced by doing so? It appears that most of the attention has been focused on the public policy issue rather than whether the commission has a legal basis to require the continuation of the service offering.

The majority summarily rejects CenturyTel's argument that grandfathering RCF is a business decision CenturyTel should be allowed to make because no law or regulation requires RCF to be provided. The majority reasons that *"RCF is a well-established and useful service that benefits CenturyTel's customers. The primary reason CenturyTel wants to limit the future availability of that service is to erect barriers in front of its competitor. The Commission will not approve tariffs that would limit the availability of a service that is necessary to provide adequate and just and reasonable service to CenturyTel's customers."*

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Assuming *arguendo* that RCF is a well-established and useful service, that is not enough to render it necessary for the provision of adequate and just and reasonable service. Furthermore, CenturyTel's reason for discontinuing the service is of no relevance since the law does not give the Commission the discretion to make such a business decision.

The majority cites the following statutory language to support its position, *"Every telecommunications company shall furnish and provide with respect to its business such instrumentalities and facilities as shall be adequate and in all respects just and reasonable."* (392.200.1 RSMo.) I believe the statute actually limits the authority of the Commission in this regard. The statute requires the telecommunications company to provide "adequate" services and such services shall

be "in all respects just and reasonable." RCF is a non-essential service and is not required to be offered by any law or regulation. If RCF were an essential service, the Commission would have included RCF in the "minimum elements necessary for basic local and interexchange telecommunications service" under 4 CSR 240-32.100(2). Thus, RCF is not an essential element of "adequate" service. The commission, therefore, has no authority to require the offering of RCF.

Without a legal requirement to offer RCF, I believe this is simply a business decision that CenturyTel should be allowed to make. Additionally, the majority's decision may be a disincentive for utilities to offer certain non-essential services when they are unsure of the financial outcome and success of such offerings.

For these reasons, I do not support the vote to adopt the Report and Order rejecting the tariff filings to grandfather remote call forward services to existing customers and existing locations.

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**In the Matter of the Empire District Electric Company of Joplin,
Missouri for Authority to File Tariffs Increasing Rates for Electric
Service Provided to Customers in the Missouri Service Area of the
Company***

Case No. ER-2006-0315

Decided: December 4, 2007

Electric §1. The Commission ordered that the Order Granting Expedited Treatment and Approving Tariffs issued on December 29, 2006, be vacated and that the proposed electric service tariff sheets submitted by Empire District Electric Company on December 28, 2006 be approved for service on and after December 14, 2007.

**ORDER VACATING DECEMBER 29, 2006 ORDER GRANTING
EXPEDITED TREATMENT AND APPROVING TARIFFS,
AND ORDER APPROVING TARIFFS**

The Commission received the mandate and final opinion of the Missouri Supreme Court in Case No. SC88390 issued by the Supreme Court on November 15, 2007. According to that mandate, the Commission must "vacate its order granting expedited treatment and approving tariffs issued on December 29, 2006, and allow public counsel reasonable time to prepare and file an application for rehearing on the tariffs." To comply with the mandate, the Commission hereby vacates its order as directed, and simultaneously re-approves the tariff sheets filed by The Empire District Electric Company on December 28, 2006.

On December 21, 2006, the Missouri Public Service Commission issued its Report and Order rejecting tariffs filed on February 1, 2006, by Empire. The Report and Order also found that the rates being charged by Empire as a result of Commission Case No. ER-2004-0570 were no longer just and reasonable and authorized Empire to file new tariffs that complied with the substantive portions of the Report and Order.

On December 28, 2006, Empire filed revised tariff sheets with a proposed effective date of January 27, 2007, and a motion for expedited treatment requesting the Commission approve the revised tariffs to be effective January 1, 2007. Empire stated the tariff sheets were filed in compliance with the Commission's December 21, 2006 Report and Order. On December 28, 2006, the Office of the Public Counsel, Praxair, Inc., and Explorer Pipeline objected to the tariff filings arguing that expedited

*This case was appealed to the Missouri Court of Appeals (WD71988) and affirmed. See 328 S.W.3d 329(Mo. App. W.D. 2010)

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treatment did not provide the parties an opportunity to review the revised tariffs.

On December 29, 2006, the Staff of the Commission filed its Staff Recommendation. Staff reviewed the filed tariff sheets, which Staff found to be in compliance with the Commission's Report and Order. Staff supported expedited approval of the tariff sheets, based on certain assumptions set forth in the cover pleading of the Staff Recommendation. The Commission finds those assumptions reasonably reflect the findings and conclusions of the Report and Order.

One of the assumptions concerned a sub-issue under the Regulatory Plan Amortizations issue. The sub-issue was whether the March 31, 2006 discounted present values of the two purchased power contracts should be further adjusted by a 10% risk factor (as proposed by the OPC) or not (as proposed by the Staff). In its resolution of that issue in its Report and Order, the Commission incorrectly found and concluded that there were no remaining disputes concerning the amortizations. The Commission did find the Staff's position to be reasonable, which is the position used to evaluate the December 28, 2006 tariffs. Because the analysis reflects the Commission's finding, the conclusion that the tariffs comply with the Report and Order is also reasonable and proper. The Report and Order was clarified on January 9, 2007, to remove language concerning a lack of dispute on this sub-issue and to clarify the meaning of "Staff's position" to include its position on the inappropriateness of further adjustment to the March 31, 2006 discounted present values of the two purchased power contracts.

On December 29, 2006, the Commission granted Empire's request for expedited treatment and approved its rates effective on January 1, 2007.¹ The Commission has again reviewed the proposed tariff sheets and Staff's Memorandum and Recommendation. After considering Staff's recommendation, the Commission continues to find that good cause exists pursuant to Section 393.140(11), RSMo 2000, for the December 28, 2006 tariff sheets to become effective on an expedited basis. The Commission concludes that the proposed tariff sheets are consistent with the Commission's Report and Order and the January 9, 2007 order clarifying the Report and Order, and should be approved to become effective as ordered below. The Commission further concludes that the requests for delay and further suspension are not reasonable and would preclude

¹ Order Granting Expedited Treatment and Approving Tariffs, issued Dec. 29, 2006, effective Jan. 1, 2007.

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Empire from earning the just and reasonable return as the Commission determined in the Report and Order and subsequent order clarifying.

Public Counsel challenged the Commission's December 29, 2006 order by extraordinary writ. On October 30, 2007, the Missouri Supreme Court made its preliminary writ issued in Case No. SC88390 peremptory and issued an opinion directing the Commission to vacate its December 29, 2006 order "and allow public counsel reasonable time to prepare and file an application for rehearing on the tariffs." The Supreme Court also stated in footnote three of its opinion:

It should be noted that the question before this Court is *not* whether or not the December 29, 2006 order meets the two-prong test described in *State ex rel. Utility Consumers Council of Missouri v. Public Service Commission*, 585 S.W.2d 41, 47. In *Utility Consumers*, the Court evaluated the substance of a PSC order on a writ of review, finding that on "appeal, our role is to determine whether the commission's report and order was lawful and, if so, whether it was reasonable." . . . This standard of review does not apply in the present case, because an application for rehearing was never filed. Here, the Court does not examine the lawfulness and reasonableness of the substance of the December 29, 2006 order, but rather, whether the timing of its issuance foreclosed the possibility of rehearing.

Thus, the Supreme Court did not examine the lawfulness or reasonableness of the substance of the December 29, 2006 order. The Supreme Court only examined whether the parties had been given sufficient time to request rehearing.

Section 386.490.3, RSMo, states that "[e]very order or decision of the commission . . . shall continue in force . . . until changed or abrogated by the commission, unless such order be unauthorized by this law or any other law . . ." Furthermore, Section 393.140(11), RSMo, states:

No corporation shall charge . . . a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time; nor shall any corporation refund or remit in any manner or by any device any portion of the rates or charges so specified . . .

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Until the December 29, 2007 order of the Commission is vacated, it remains in full force and effect and Empire is required under the statute to charge only the rates in effect.

The mandate charges the Commission with two tasks: First, vacate its earlier order; and second, provide a reasonable opportunity for a request for rehearing of the Commission's decision regarding the tariffs. Because this is an extraordinary remedy, implementing the mandate does not fit neatly into the statutory or regulatory framework of the Commission. The Commission cannot literally turn back the clock. The facts are that almost eleven months have passed, Empire has been providing service, and Empire has been charging its customers for that service.

The Commission is faced with two possibilities for implementing the second half of the Supreme Court's mandate. The first option is to issue an order making the tariffs effective on January 1, 2007. The second option is to issue an order making the tariffs effective on the effective date of this order.

Even though approving the tariff effective as of January 1, 2007, would create continuity in the rates to be charged, several legal issues arise if the tariffs are approved to be effective in the past. First, is it possible for the Commission to approve rates to be effective in the past? Even if this is not retroactive ratemaking, per se, it certainly gives the appearance of being so.² In addition, if returning the parties to the status quo means that the December 29, 2007 order never existed, it may not be possible for the Commission to comply with the Supreme Court's mandate to allow a reasonable time for rehearing prior to the tariffs becoming effective. This is because the tariffs, but for the existence of the order approving them, would have become effective by operation of law on January 27, 2007, as the Commission did not take action to prevent it.³

The second option is for the Commission to approve the tariffs to become effective on the effective date of this order. The problem with this

² See, *State of Missouri ex rel. Associated Natural Gas Company v. Public Service Commission of the State of Missouri*, 954 S.W.2d 520, 531 (Mo. App. WD 1997). ("The filed rate doctrine also precludes a regulated utility from collecting any rates other than those properly filed with the appropriate regulatory agency. *Nantahala*, 476 U.S. at 963, 106 S.Ct. at 2355; *Arkansas*, 453 U.S. at 577, 101 S.Ct. at 2930. This aspect of the filed rate doctrine constitutes a rule against retroactive ratemaking or retroactive rate alteration. *Columbia Gas Transmission Corp. v. F.E.R.C.*, 831 F.2d 1135, 1140 (D.C.Cir.1987)."; and *Qwest Corp. v. Koppendraye*, 436 F.3d 859, 863 (C.A.8 (Minn.), 2006). ("The rule against retroactive ratemaking prohibits a commission from prescribing rates to recoup a utility's past losses for transactions that have already taken place.").

³ Sections 393.140(11) and 393.150, RSMo.

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option is that it seems to create a "gap" in the lawful rates in effect between January 1, 2007, and the effective date of this order.

The practical effect of the two options, however, is the same. For the first option the Commission would reissue its order approving the tariffs with an appropriate effective date, then the parties will be afforded a reasonable opportunity to request rehearing, and the just and reasonable rates determined by the Commission will have been in effect since January 1, 2007. This would return the parties to the position they would have been in had they been able to timely request rehearing. The tariffs would be in effect, but a challenge to them would exist.

If the Commission approves the rates to be effective on the effective date of this order, the practical effect will be the same as with the first option. That is, the parties will be returned to the status quo with regard to an opportunity to request rehearing. In addition, Section 393.140(11), requires Empire to charge the rates that are "in effect at the time."⁴ Thus, the Commission concludes that if Empire charged the rates as approved in the December 29, 2007 order, it charged the correct rates. And further, those rates remain the rates "in effect at the time" until the order is vacated.⁵ After the order is vacated, the current order approving the tariffs will become effective and once again, Empire will be required to charge the just and reasonable rates as determined by the Commission in its Report and Order and clarifying order. The parties will still be in the position of having effective tariffs with an outstanding challenge. Thus, the just and reasonable rates as determined in the Commission's Report and Order and clarifying order will have been the rates being charged continuously since January 1, 2007. The Commission concludes that since the practical effect of the two options is the same, and the latter option allows the Commission to most clearly comply with the mandate of the Supreme Court, it is more appropriate to approve the tariffs to become effective in the future, rather than in the past.

With this order the Commission reiterates its earlier finding that Empire's December 28, 2006 tariff sheets comply with the December 21, 2006 Report and Order. This order fully complies with the Supreme Court's mandate to vacate its previous order and to provide the parties with the opportunity to seek rehearing if they choose to do so. Thus, the Commission concludes that it shall vacate its December 29, 2007 order,

⁴ Emphasis added.

⁵ Section 393.140, RSMo. See also, *State of Missouri ex rel. Associated Natural Gas Company v. Public Service Commission of the State of Missouri*, 954 S.W.2d 520 (Mo. App. WD 1997).

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approve the December 28, 2006 tariffs, and allow ten days before the order becomes effective so that the parties have ample opportunity to request rehearing.

IT IS ORDERED THAT:

1. The Order Granting Expedited Treatment and Approving Tariffs issued on December 29, 2006, is vacated.

2. The proposed electric service tariff sheets submitted under Tariff File No. YE-2007-0488 on December 28, 2006, by The Empire District Electric Company for the purpose of increasing rates for retail electric service to customers are hereby approved for service on and after December 14, 2007. The specific sheets approved are:

P.S.C. Mo. No. 5, Section A

21st Revised Sheet No. 1, Canceling 20th Revised Sheet No. 1

P.S.C. Mo. No. 5, Section B

2nd Revised Sheet No. 1, Canceling 1st Revised Sheet No. 1

1st Revised Sheet No. 2, Canceling Original Sheet No. 2

1st Revised Sheet No. 3, Canceling Original Sheet No. 3

1st Revised Sheet No. 4, Canceling Original Sheet No. 4

1st Revised Sheet No. 5, Canceling Original Sheet No. 5

1st Revised Sheet No. 6, Canceling Original Sheet No. 6

1st Revised Sheet No. 7, Canceling Original Sheet No. 7

1st Revised Sheet No. 7a, Canceling Original Sheet No. 7a

1st Revised Sheet No. 8, Canceling Original Sheet No. 8

P.S.C. Mo. No. 5, Section 1

13th Revised Sheet No. 1, Canceling 12th Revised Sheet No. 1

10th Revised Sheet No. 2, Canceling 9th Revised Sheet No. 2

6th Revised Sheet No. 3, Canceling 5th Revised Sheet No. 3

P.S.C. Mo. No. 5, Section 2

12th Revised Sheet No. 1, Canceling 11th Revised Sheet No. 1

1st Revised Sheet No. 1a, Canceling Original Sheet No. 1a

12th Revised Sheet No. 2, Canceling 11th Revised Sheet No. 2

1st Revised Sheet No. 2a, Canceling Original Sheet No. 2a

12th Revised Sheet No. 3, Canceling 11th Revised Sheet No. 3

7th Revised Sheet No. 3a, Canceling 6th Revised Sheet No. 3a

13th Revised Sheet No. 4, Canceling 12th Revised Sheet No. 4

8th Revised Sheet No. 4a, Canceling 7th Revised Sheet No. 4a

12th Revised Sheet No. 5, Canceling 11th Revised Sheet No. 5

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12th Revised Sheet No. 6, Canceling 11th Revised Sheet No. 6
12th Revised Sheet No. 7, Canceling 11th Revised Sheet No. 7
5th Revised Sheet No. 7a, Canceling 4th Revised Sheet No. 7a
6th Revised Sheet No. 8, Canceling 5th Revised Sheet No. 8
8th Revised Sheet No. 9, Canceling 7th Revised Sheet No. 9
5th Revised Sheet No. 9a, Canceling 4th Revised Sheet No. 9a
6th Revised Sheet No. 9b, Canceling 5th Revised Sheet No. 9b
5th Revised Sheet No. 10, Canceling 4th Revised Sheet No. 10
5th Revised Sheet No. 10a, Canceling 4th Revised Sheet No. 10a
3rd Revised Sheet No. 11, Canceling 2nd Revised Sheet No. 11
3rd Revised Sheet No. 11a, Canceling 2nd Revised Sheet No. 11a
3rd Revised Sheet No. 12, Canceling 2nd Revised Sheet No. 12
3rd Revised Sheet No. 12a, Canceling 2nd Revised Sheet No. 12a
7th Revised Sheet No. 13, Canceling 6th Revised Sheet No. 13
4th Revised Sheet No. 14, Canceling 3rd Revised Sheet No. 14
4th Revised Sheet No. 14a, Canceling 3rd Revised Sheet No. 14a
4th Revised Sheet No. 14b, Canceling 3rd Revised Sheet No. 14b
4th Revised Sheet No. 14c, Canceling 3rd Revised Sheet No. 14c
4th Revised Sheet No. 14d, Canceling 3rd Revised Sheet No. 14d
4th Revised Sheet No. 14e, Canceling 3rd Revised Sheet No. 14e

P.S.C. Mo. No. 5, Section 3

13th Revised Sheet No. 1, Canceling 12th Revised Sheet No. 1
6th Revised Sheet No. 1a, Canceling 5th Revised Sheet No. 1a
17th Revised Sheet No. 2, Canceling 16th Revised Sheet No. 2
8th Revised Sheet No. 2a, Canceling 7th Revised Sheet No. 2a
12th Revised Sheet No. 3, Canceling 11th Revised Sheet No. 3
1st Revised Sheet No. 3a, Canceling Original Sheet No. 3a
12th Revised Sheet No. 4, Canceling 11th Revised Sheet No. 4
4th Revised Sheet No. 5, Canceling 3rd Revised Sheet No. 5
2nd Revised Sheet No. 6, Canceling 1st Revised Sheet No. 6
1st Revised Sheet No. 7, Canceling Original Sheet No. 7
1st Revised Sheet No. 8, Canceling Original Sheet No. 8
1st Revised Sheet No. 9, Canceling Original Sheet No. 9

P.S.C. Mo. No. 5, Section 4

4th Revised Sheet No. 1, Canceling 3rd Revised Sheet No. 1
11th Revised Sheet No. 2, Canceling 10th Revised Sheet No. 2
9th Revised Sheet No. 3, Canceling 8th Revised Sheet No. 3
9th Revised Sheet No. 4, Canceling 8th Revised Sheet No. 4

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3. This order shall become effective on December 14, 2007.

Davis, Chm., Murray, Appling,
and Jarrett, CC., concur.
Clayton, C., dissents.

Dippell, Deputy Chief Regulatory Law Judge

Note: A Notice of Correction to this order is available in the official case files of the Public Service Commission.

In the Matter of the Application of Kansas City Power & Light Company for Approval to Make Certain Changes in its Charges for Electric Service to Implement its Regulatory Plan

*Case No. ER-2007-0291
Decided December 6, 2007*

Electric §20. The Commission found an appropriate return on equity and other typical factors in determining Kansas City Power & Light's revenue requirement.

REPORT AND ORDER

APPEARANCES

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Arthur Perry Bruder and Lewis Campbell, Esq., United States Department of Energy, Office of General Counsel, 1000 Independence Avenue S.W., Washington, DC 20585, for the United States Department of Energy, on behalf of the National Nuclear Security Administration.

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Kevin A. Thompson, Esq., General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

Steven Dottheim, Esq., Deputy Chief General Counsel, **Nathan Williams, Esq.**, Deputy General Counsel, and **Sara Kliethermes, Esq.**, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

SENIOR REGULATORY LAW JUDGE: Ronald D. Pridgin

Procedural History

On February 1, 2007, Kansas City Power & Light Company submitted to the Commission proposed tariff sheets, effective for service on and after January 1, 2008, that are intended to implement a general rate

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increase for electrical service provided in its Missouri service area.¹ KCPL's proposed tariffs would increase its Missouri jurisdictional revenues by approximately \$45 million, or by 8.3%.² The Commission issued an Order and Notice on February 6, in which it gave interested parties until February 26 to request intervention.

The Commission received timely intervention requests from: Pershing Road Development Company; Missouri Gas Energy, a Division of Southern Union Company; and Trigen-Kansas City Energy Corporation. In addition, the Commission received untimely intervention requests from the United States Department of Energy, acting on behalf of the National Nuclear Security Administration, and the City of Kansas City, Missouri. The Commission granted these requests.

In addition, in Commission Case No. EO-2005-0329, KCPL had entered into a Stipulation and Agreement regarding an Experimental Regulatory Plan, which was the genesis for this rate case. A portion of that agreement provided that the non-KCPL signatories would automatically become intervenors in this rate case. The non-KCPL signatories to the Stipulation and Agreement in Case No. EO-2005-0329 that are intervenors in this case are: the Staff of the Commission; the Office of the Public Counsel; the Missouri Department of Natural Resources; Praxair, Inc.; Missouri Industrial Energy Consumers; Ford Motor Co.; Aquila, Inc.; The Empire District Electric Company; Missouri Joint Municipal Electric Utility Commission; and the City of Kansas City, Missouri.

Furthermore, part of the Commission's February 6 notice stated that in Case No. EO-2005-0329, the signatories to the stipulation in that case agreed that the test year for this case would be the historic test year period ending December 31, 2006, updated for known and measurable changes through June 30, with a true-up period through September 30, and KCPL filing a reconciliation in the true-up proceeding on or about October 21. At the parties' request, the Commission changed the end of the update period from June 30, to March 31. No parties objected to the remainder of the true-up dates, and the Commission adopted them. The Commission held local public hearings in Marshall and Carrollton on August 20 and in Kansas City on August 22, an evidentiary hearing on October 1-5 and 9-12, and a true-up hearing on November 8.

¹ Unless otherwise stated, all dates are in 2007.

² Staff and KCPL filed a True-Up Reconciliation/ Reconciliation on November 5, in which KCPL's trued-up revenue requirement was \$47,318,855. However, at the true-up hearing, KCPL stated that it was not seeking recovery of the trued-up number, but of the approximately \$45 million amount as filed in its direct case. See Tr. Vol. 15, p. 1287.

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Non-Unanimous Stipulations and Agreements

On October 3, during the hearing, KCPL and Staff filed a Stipulation and Agreement as to Certain Issues. The stipulation resolved the rate base issues, and many of the expense issues. The Commission allowed parties until noon, October 9 to object. No parties objected. Therefore, as permitted by Commission Rule 4 CSR 240-2.115, the Commission will treat the stipulation, affixed to this Report and Order as Appendix A, as if it were unanimous. The Commission finds the above-referenced stipulation reasonable and approves it.

Also, on November 13, KCPL and Staff filed a Nonunanimous Stipulation and Agreement Regarding Pensions. Commission Rule 4 CSR 240-2.115(2)(B) allows parties seven days to object to a nonunanimous stipulation and agreement. No party objected; therefore, the Commission will treat the stipulation, affixed to this Report and Order as Appendix B, as if it were unanimous.

Conclusions of Law

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact and conclusions of law. The positions and arguments of all of the parties have been considered by the Commission in making this decision.

Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision. When making findings of fact based upon witness testimony, the Commission will assign the appropriate weight to the testimony of each witness based upon their qualifications, expertise and credibility with regard to the attested to subject matter.³

Conclusions of Law Regarding Jurisdiction

KCPL is an electric utility and a public utility subject to Commission jurisdiction.⁴ The Commission has authority to regulate the rates KCPL may charge for electricity.⁵

³ Witness credibility is solely within the discretion of the Commission, who is free to believe all, some, or none of a witness' testimony. *State ex. rel. Missouri Gas Energy v. Public Service Comm'n*, 186 S.W.3d 376, 389 (Mo.App. 2005).

⁴ Section 386.020(15), (42) RSMo 2006 (all statutory cites to RSMo 2006 unless otherwise indicated).

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The Staff of the Commission is represented by the Commission's General Counsel, an employee of the Commission authorized by statute to "represent and appear for the commission in all actions and proceedings involving this or any other law [involving the commission.]"⁶ The Public Counsel is appointed by the Director of the Missouri Department of Economic Development and is authorized to "represent and protect the interests of the public in any proceeding before or appeal from the public service commission[.]"⁷ The remaining parties include governmental entities, other electric utilities, and industrial and commercial consumers.

Burden of Proof

"At any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the . . . electrical corporation . . . and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."⁸

Ratemaking Standards and Practices

The Commission is vested with the state's police power to set "just and reasonable" rates for public utility services,⁹ subject to judicial review of the question of reasonableness.¹⁰ A "just and reasonable" rate is one that is fair to both the utility and its customers;¹¹ it is no more than is sufficient to "keep public utility plants in proper repair for effective public service, [and] . . . to insure to the investors a reasonable return upon funds invested."¹² In 1925, the Missouri Supreme Court stated:¹³

⁵ Section 393.140(11).

⁶ Section 386.071.

⁷ Sections 386.700 and 386.710.

⁸ Section 393.150.2.

⁹ Section 393.130, in pertinent part, requires a utility's charges to be "just and reasonable" and not in excess of charges allowed by law or by order of the commission. Section 393.140 authorizes the Commission to determine "just and reasonable" rates.

¹⁰ *St. ex rel. City of Harrisonville v. Pub. Serv. Comm'n of Missouri*, 291 Mo. 432, 236 S.W. 852 (Mo. banc. 1922); *City of Fulton v. Pub. Serv. Comm'n*, 275 Mo. 67, 204 S.W. 386 (Mo. banc. 1918), *error dis'd*, 251 U.S. 546, 40 S.Ct. 342, 64 L.Ed. 408; *City of St. Louis v. Pub. Serv. Comm'n of Missouri*, 276 Mo. 509, 207 S.W. 799 (1919); *Kansas City v. Pub. Serv. Comm'n of Missouri*, 276 Mo. 539, 210 S.W. 381 (1919), *error dis'd*, 250 U.S. 652, 40 S.Ct. 54, 63 L.Ed. 1190; *Lightfoot v. City of Springfield*, 361 Mo. 659, 236 S.W.2d 348 (1951).

¹¹ *St. ex rel. Valley Sewage Co. v. Pub. Serv. Comm'n*, 515 S.W.2d 845 (Mo. App. 1974).

¹² *St. ex rel. Washington University et al. v. Pub. Serv. Comm'n*, 308 Mo. 328, 344-45, 272 S.W. 971, 973 (Mo. banc 1925).

¹³ *Id.*

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The enactment of the Public Service Act marked a new era in the history of public utilities. Its purpose is to require the general public not only to pay rates which will keep public utility plants in proper repair for effective public service, but further to insure to the investors a reasonable return upon funds invested. The police power of the state demands as much. We can never have efficient service, unless there is a reasonable guaranty of fair returns for capital invested. * * * These instrumentalities are a part of the very life blood of the state, and of its people, and a fair administration of the act is mandatory. When we say "fair," we mean fair to the public, and fair to the investors.

The Commission's guiding purpose in setting rates is to protect the consumer against the natural monopoly of the public utility, generally the sole provider of a public necessity.¹⁴ "[T]he dominant thought and purpose of the policy is the protection of the public . . . [and] the protection given the utility is merely incidental."¹⁵ However, the Commission must also afford the utility an opportunity to recover a reasonable return on the assets it has devoted to the public service.¹⁶ "There can be no argument but that the Company and its stockholders have a constitutional right to a fair and reasonable return upon their investment."¹⁷

The Commission has exclusive jurisdiction to establish public utility rates,¹⁸ and the rates it sets have the force and effect of law.¹⁹ A public utility has no right to fix its own rates and cannot charge or collect rates that have not been approved by the Commission;²⁰ neither can a public utility change its rates without first seeking authority from the Commission.²¹ A public utility may submit rate schedules or "tariffs," and thereby suggest to the Commission rates and classifications which it believes are just and

¹⁴ *May Dep't Stores Co. v. Union Elec. Light & Power Co.*, 341 Mo. 299, 107 S.W.2d 41, 48 (Mo. App. 1937).

¹⁵ *St. ex rel. Crown Coach Co. v. Pub. Serv. Comm'n*, 179 S.W.2d 123, 126 (1944).

¹⁶ *St. ex rel. Utility Consumers Council, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. banc 1979).

¹⁷ *St. ex rel. Missouri Public Service Co. v. Fraas*, 627 S.W.2d 882, 886 (Mo. App. 1981).

¹⁸ *May Dep't Stores*, *supra*, 107 S.W.2d at 57.

¹⁹ *Utility Consumers Council*, *supra*, 585 S.W.2d at 49.

²⁰ *Id.*

²¹ *Deaconess Manor Ass'n v. Pub. Serv. Comm'n*, 994 S.W.2d 602, 610 (Mo. App. 1999).

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reasonable, but the final decision is the Commission's.²² Thus, "[r]atemaking is a balancing process."²³

Ratemaking involves two successive processes: first, the determination of the "revenue requirement," that is, the amount of revenue the utility must receive to pay the costs of producing the utility service while yielding a reasonable rate of return to the investors.²⁴ The second process is rate design, that is, the construction of tariffs that will collect the necessary revenue requirement from the ratepayers. Revenue requirement is usually established based upon a historical test year that focuses on four factors:²⁵ (1) the rate of return the utility has an opportunity to earn; (2) the rate base upon which a return may be earned; (3) the depreciation costs of plant and equipment; and (4) allowable operating expenses. The calculation of revenue requirement from these four factors is expressed in the following formula:

$$RR = C + (V - D) R$$

where: RR = Revenue Requirement;
C = Prudent Operating Costs,
including Depreciation
Expense and Taxes;
V = Gross Value of Utility Plant
in Service;
D = Accumulated Depreciation;
and
R = Overall Rate of Return or
Weighted Cost of Capital.

The return on the rate base is calculated by applying a rate of return, that is, the weighted cost of capital, to the original cost of the assets dedicated to public service less accumulated depreciation.²⁶ The Public Service Commission Act vests the Commission with the necessary authority to perform these functions. The Commission can prescribe uniform methods of accounting for utilities, and can examine a utility's books and

²² May Dep't Stores, *supra*, 107 S.W.2d at 50.

²³ St. ex rel. Union Elec. Co. v. Pub. Serv. Comm'n, 765 S.W.2d 618, 622 (Mo. App. 1988).

²⁴ St. ex rel. Capital City Water Co. v. Missouri Pub. Serv. Comm'n, 850 S.W.2d 903, 916 n. 1 (Mo. App. 1993).

²⁵ In the present case, the test year was established as the twelve months ending December 31, 2006, updated for known and measurable changes through March 31, 2007. See *In re KCPL*, Case No. ER-2007-0291, *Order Concerning Test Year and True-up, and Adopting Procedural Schedule* (April 5, 2007).

²⁶ See St. ex rel. Union Elec. Co., 765 S.W.2d at 622.

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records and, after hearing, can determine the accounting treatment of any particular transaction.²⁷ In this way, the Commission can determine the utility's prudent operating costs. The Commission can value the property of electric utilities operating in Missouri that is used and useful to determine the rate base.²⁸ Finally, the Commission can set depreciation rates and adjust a utility's depreciation reserve from time-to-time as may be necessary.²⁹

The Revenue Requirement is the sum of two components: first, the utility's prudent operating expenses, and second, an amount calculated by multiplying the value of the utility's depreciated assets by a rate of return. For any utility, its fair rate of return is simply its composite cost of capital. The composite cost of capital is the sum of the weighted cost of each component of the utility's capital structure. The weighted cost of each capital component is calculated by multiplying its cost by a percentage expressing its proportion in the capital structure. Where possible, the cost used is the "embedded" or historical cost; however, in the case of Common Equity, the cost used is its estimated cost.

The Issues

On September 21, Staff submitted a list of issues for determination by the Commission. Commission Rule 4 CSR 240-2.080(15) allows parties ten days to respond to pleadings. No party timely objected to Staff's list.

Also, on November 9, the Commission ordered the parties to tell the Commission whether they believe the Commission should rule upon any other issue other than the ones listed in the September 21 List of Issues. The November 15 deadline to respond to the November 9 order passed, and no parties responded.

Therefore, the only issues pending in this case are resolved below.

Rate of Return

1. *Return on Common Equity: What return on common equity should be used for determining KCPL's rate of return?*

a. *Is KCPL's decreased risk due to the Kansas City Power & Light Company Experimental Regulatory Plan the Commission approved in Case No. EO-2005-0329 a factor that reduces the return on common equity otherwise appropriate for KCPL?*

²⁷ Section 393.140.

²⁸ Section 393.230. Section 393.135 expressly prohibits the inclusion in electric rates of costs pertaining to property that is not "used and useful."

²⁹ Section 393.240.

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b. Is KCPL's increased risk due to its large construction undertakings a factor that increases the return on common equity otherwise appropriate for KCPL?

c. If so, what is the impact of these factors?

Cost of Common Equity:

Discussion

Determining an appropriate return on equity is without a doubt the most difficult part of determining a rate of return. The cost of long-term debt and the cost of preferred stock are relatively easy to determine because their rate of return is specified within the instruments that create them. In contrast, determining a return on equity requires speculation about the desires and requirements of investors when they choose to invest their money in KCPL rather than elsewhere.

For additional guidance on exactly where the Commission should set KCPL's return on equity, the Commission must turn to the expert advice offered by financial analysts. This "is an area of ratemaking in which agencies welcome expert testimony and yet must often make difficult choices between conflicting testimony."³⁰

KCPL, Staff, and OPC sponsored financial analysts who recommended a return on equity in this case. Their recommended ROEs are: KCPL – 11.25%, OPC – 10.1%; Staff – 9.14-10.3%, the median of which is 9.72%. The recommended ROEs all fall into a "zone of reasonableness" described further in the Conclusions of Law, so the Commission cannot immediately exclude any of these recommendations for a lack of reasonableness.

The Commission does not believe it would be necessarily be appropriate for its return on equity finding to simply mirror the national average. That average, of course, could be appropriate for KCPL, or for any other utility. But, if all commissions just approved average ROEs, then returns on equity would not change, and commission approved ROEs would merely cluster around each other despite changing economic conditions and different companies' management styles.

The circularity of such behavior should be apparent. Nonetheless, the national average is a good indicator of the capital market in which KCPL will have to compete for the equity needed to finance its operations. The Commission has an obligation under the law, as well as a matter of practical necessity, to allow KCPL an opportunity to earn a return that will allow it to

³⁰ L.S. Goodman, 1 The Process of Ratemaking, 606 (1998).

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compete in the capital market. No one, including ratepayers, benefits if KCPL is starved for capital, especially while KCPL is investing hundreds of millions of dollars in infrastructure to implement the Experimental Regulatory Plan.

To further put these recommendations in perspective, the Commission notes that in the first six months of 2007, the lowest electric ROE awarded was 9.67%, and the highest was 10.9%.³¹ When compared to other nationwide electric ROEs awarded the first half of 2007, if the Commission adopted Staff's median ROE of 9.72%, KCPL's ROE would be the second lowest in the nation, only five basis points away from the bottom. On the other hand, if the Commission picked KCPL's recommendation, then KCPL would earn the highest ROE in the United States by over 30 basis points. Finally, using OPC's recommendation, KCPL's ROE would be somewhat below average; of the 18 reported ROEs the first half of 2007, 14 of them, including Missouri regulated AmerenUE and Aquila, were at or above the 10.1% recommended by OPC.³² The evidence further suggests that vertically integrated utilities like KCPL tend to receive higher ROEs, and that distribution companies operating in some form of restructured environment are less risky.³³

Economists employ a variety of methods to try to ascertain a proper return on equity. The comparable earnings method is one way to do so. That method reviews accounting returns for unregulated companies that are believed to have similar risk to the regulated company whose return is being estimated. But this method is generally not favored, since it assumes the unregulated companies are earning actual cost of capital, and that its equity book value and market book value are the same.³⁴

The Capital Asset Pricing Model (CAPM) is a risk premium approach that estimates the cost of equity by combining a virtually risk-free government bond rate with explicit risk measures to determine the risk premium that the market requires. This model is not used in many regulatory jurisdictions because of the additional data requirements and potentially questionable underlying assumptions.³⁵ Because analysts cannot actually know investor expectations, it is not possible to know how those expectations or formed, or to know what time period is most

³¹ Ex. 121, p. 4.

³² Id.

³³ Tr. Vol. 6, pp. 244-45.

³⁴ Ex. 11, p. 15.

³⁵ Id.

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appropriate in the analysis.³⁶ Such a risk premium model, though, is a useful parallel approach with the Discounted Cash Flow (DCF) model as a check on reasonableness of the ROE estimation.³⁷

The DCF model is the most widely used ROE estimation model, and is essentially the sum of the expected dividend yield and the expected long-term dividend growth rate. But because the technical application of the model requires long-term growth estimates out to infinity, some see the model as too speculative. Thus, a multistage growth DCF model is often used to minimize the speculative aspects of the model.³⁸ A multistage model is simply expanded to incorporate more than one growth period rate.³⁹

A combination of the DCF model and a risk premium model gives the most accurate estimate of investors' expectations, and will be used to analyze return on equity in this case.⁴⁰ Indeed, OPC witness Gorman also used a recommended return on equity based on a constant growth DCF, a two-stage growth DCF model, a Risk Premium model and a CAPM analysis.⁴¹ Staff witness Barnes used DCF as his primary tool, with CAPM used as a reasonableness check on his result.⁴² And KCPL witness Hadaway uses three versions of the DCF model for his analysis, with a risk premium model check on the reasonableness of his results.⁴³

The Commission must now analyze these suggested ROEs.

KCPL

KCPL's main witness on this issue was Dr. Hadaway. Dr. Hadaway's credentials are impeccable; he earned his Doctor of Philosophy in Finance from The University of Texas – Austin in 1975, and has also been an adjunct professor there.⁴⁴ He has also been either an Assistant or Associate Professor of Finance at The University of Alabama, Texas Tech University and Texas State University – San Marcos. Furthermore, Dr. Hadaway was Director of the Economic Research Division at the Public Utility Commission of Texas. His job duties consisted of supervising the Texas Commission's economic, finance and accounting staffs, as well as serving as the Texas Commission's chief financial witness

³⁶ Id. at 19.

³⁷ Id. at 21-22.

³⁸ Id. at 15.

³⁹ Id. at 19.

⁴⁰ Id. at 22.

⁴¹ Ex. 201, p. 2.

⁴² Ex. 105, pp. 14-15.

⁴³ Ex. 11, p. 32, 36.

⁴⁴ Ex. 11, App. A.

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in telecommunications and electric cases. Finally, he has taught numerous courses at utility conferences concerning, among other issues, cost of capital.

Dr. Hadaway's analysis began with a reference group of 26 companies that have: at least a triple-B (investment grade) bond rating; at least 70 percent of revenues from regulated utility sales; consistent financial records not affected by recent mergers or restructuring; and a consistent dividend record with no dividend cuts within the past two years.⁴⁵ Once he obtained his proxy group, Dr. Hadaway then used three versions of the discounted cash flow (DCF) model.⁴⁶ Dr. Hadaway's explanation of the DCF model is that it

comes from taking the present value of all the dividends that investors expect to get. In that model you discount all the dividends back to today. That tells you the price of the stock. You assume that you know what the required rate of return is in that calculation. ROE witnesses flip the model around and they say we want to take today's price of the stock, the estimates of the dividends and we want to derive the rate of return.⁴⁷

His analysis using traditional DCF was a range of 9.4 to 9.5%; however, because that result falls some 100 basis points below his risk premium check of reasonableness, he excludes those results.⁴⁸ Dr. Hadaway then used recalculated constant growth results with the growth rate based on long-term forecasted growth in GDP, yielding an ROE range of 10.7% to 10.8%.⁴⁹ He did this because growth in nominal GDP (real GDP plus inflation) is the most general measure of growth in the U.S. economy, and because of his reliance on academicians who postulate that dividend growth on average is expected to continue in the foreseeable future at about the same rate as that of the nominal gross domestic product (real GDP plus inflation).⁵⁰ Finally, using a multistage DCF model, Dr. Hadaway arrived at an ROE range of 10.5% to 10.8%.⁵¹ Dr. Hadaway used a multistage DCF model because the constant growth aspect of the traditional DCF model does not fit the reality of the wild fluctuations, and

⁴⁵ Ex. 11, pp. 3-4; 32.

⁴⁶ *Id.* at p. 32.

⁴⁷ Tr. Vol. 6, p. 248.

⁴⁸ Ex. 11, pp. 35-36.

⁴⁹ *Id.* at 36.

⁵⁰ Ex. 11, p. 33-34 (cites omitted).

⁵¹ *Id.*

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even complete elimination of some electric utility dividends, during the past twenty years.⁵²

In short, Dr. Hadaway used a risk premium model as a check of reasonableness on his DCF results, and his results from that model were between 10.7% and 11.4%.⁵³ His ultimate ROE recommendation is an approximate mid-point of that range at 11.25%, which consists of his overall average return on equity of 10.75% combined with an extra 50 basis points to account for the high construction risk KCPL will have during its Experimental Regulatory Plan, for a total of 11.25% recommended ROE.⁵⁴ His “adder” came from risk adders he studied in FERC cases, and he used a 50 basis point adder because that is the smallest adder FERC has recently used.⁵⁵

Staff

Staff witness Matthew Barnes earned a Bachelor of Science Degree in Business Administration in Accounting from Columbia College in December 2002, and an MBA with an emphasis in Accounting from William Woods University in May 2005. He has been an auditor for Staff since 2003.⁵⁶

Mr. Barnes used sixteen companies in his proxy group.⁵⁷ Beginning with 66 companies listed in ValueLine⁵⁸ as electric utilities, he narrowed his list to the 16 companies in his proxy group that met the following criteria: publicly traded stock; information printed in ValueLine; ten years of available data; percent of electric utility revenues greater than or equal to 70%; no pending merger in the last six months;⁵⁹ no reduced dividend in the last ten years; generation assets; two sources for projected growth with at least one available from ValueLine; and at least investment grade credit rating.

⁵² Ex. 11, p. 18.

⁵³ *Id.*

⁵⁴ *Id.* at 6-7.

⁵⁵ Tr. Vol. 6, p. 266, 269.

⁵⁶ Ex. 105, p. 1.

⁵⁷ *Id.* at p. 14.

⁵⁸ Although not described by the parties, the Commission will take administrative notice that ValueLine is an investment survey published for approximately 1,700 companies, both regulated and unregulated. It is updated quarterly and probably represents the most comprehensive and widely used of all investment information services. It provides both historical and forecasted information on a number of important data elements

⁵⁹ But GPE, KCPL's parent, has applied to buy Aquila, Inc., in Commission Case No. EM-2007-0374. That case is still pending before the Commission.

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Mr. Barnes calculated a DCF cost of common equity for each of the comparable companies.⁶⁰ First, he calculated a growth rate. Because of the volatility of historical growth rates, Mr. Barnes instead relied upon projected growth rates, which he believed would be in a range of 5.34% to 6.50%.⁶¹ Then, to arrive at an expected yield for each comparable company, Mr. Barnes used a slightly modified version of DCF to arrive at an expected yield of 3.80%.⁶² He verified the reasonableness of that result by using the CAPM (Capital Asset Pricing Model).⁶³

OPC

OPC's cost of capital witness, Michael Gorman, received a Bachelor of Science Degree in Electrical Engineering in 1983 from Southern Illinois University, and a Master's Degree in Business Administration in 1986, from The University of Illinois at Springfield.⁶⁴ He has performed financial analysis at the Illinois Commerce Commission, Merrill-Lynch, as well as his current employer, Brubaker & Associates, Inc.⁶⁵ He has testified before public utility commissions in twenty-two states.⁶⁶

Before Mr. Gorman applied a DCF analysis to determine his recommended ROE, he, like Dr. Hadaway and Mr. Barnes, had to construct a proxy group. For his group, consisting of 17 companies,⁶⁷ he began with all of the ValueLine electric utility companies, then removed those that failed to meet the following criteria: S&P's bond rating in the "BBB" and "A" categories; Moody's bond rating in the "Baa" and "A" categories; consensus analyst growth rates estimates available from Zacks, Reuters and SNL Financial; had not suspended dividends over the last two years; common equity ratios to total capital between 40% and 60%; S&P's business profile scores in the range of 4 to 6; and no significant merger and acquisition activities; not exposed to corporate or market restructuring.⁶⁸ Interestingly, he not only constructed his own group, but also used Dr. Hadaway's group as well.⁶⁹ Even though KCPL's parent company, Great Plains Energy, has proposed to buy Aquila,⁷⁰ Gorman excluded two

⁶⁰ Ex. 105, p. 17.

⁶¹ *Id.* at 17-18.

⁶² *Id.* at 18.

⁶³ *Id.* at 19.

⁶⁴ Ex. 201, App. A, p. 1.

⁶⁵ *Id.*, App. A, p. 3.

⁶⁶ *Id.*

⁶⁷ Ex. 201, Sch. MPG-3, MPG-4, MPG-5.

⁶⁸ Ex. 201, p. 10.

⁶⁹ *Id.* at 9.

⁷⁰ Commission Case No. EM-2007-0374.

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of Hadaway's companies from his "Hadaway group" because those companies are undertaking mergers or acquisitions.⁷¹

Mr. Gorman posits that the projected increase in utility earnings and dividend paying ability is not a sustainable trend, but rather is the result of an abnormally high period of industry construction expenditures. He believes that once generation reserve margins are increased, transmission capacity investments are made to alleviate transmission constraints, and environmental upgrades are complete, capital expenditures by utilities will decline to a more normal and sustainable growth level. This will, in turn, cause utility earnings to also drop to a sustainable growth level.⁷² To combat this, Mr. Gorman uses a two-stage DCF model; one stage for short-term growth, and another for long-term growth.⁷³ Using a DCF model on his own group, Mr. Gorman arrived at an ROE of 10.7%. He derived a 10.6% ROE using Dr. Hadaway's group.⁷⁴

Findings of Fact

OPC witness Gorman testified that, according to Edison Electric Institute, the average allowed return in the electric utility industry for the second quarter of 2007 was 10.27%.⁷⁵ Dr. Hadaway, a KCPL witness, also testified that the average ROEs for both the first and second quarters of 2007 was 10.27%.⁷⁶ Staff submitted a study showing that for the first two quarters of 2007, the average electric utility ROE was 10.27%.⁷⁷ Thus, the Commission finds that the recent national average of awarded ROEs is 10.27%, and that the Commission should set return on equity somewhere in between 9.27% to 11.27%.

The Commission believes Dr. Hadaway, Mr. Gorman and Mr. Barnes all quite qualified to submit ROE expert testimony, and finds all of their testimony credible. However, the Commission finds Dr. Hadaway's testimony the most persuasive for several reasons. Dr. Hadaway has more education and experience than does Mr. Gorman and Mr. Barnes. Dr. Hadaway's proxy group of 26 companies is larger than Barnes' group of 16, and Gorman's group of 17. Also, Dr. Hadaway's proxy group appears more reasonable than Mr. Gorman's or Mr. Barnes' group because Mr. Gorman and Mr. Barnes excluded companies undergoing mergers,

⁷¹ Ex. 201, p. 18.

⁷² *Id.*

⁷³ *Id.* at 19.

⁷⁴ *Id.* at 14-15.

⁷⁵ Ex. 202, p. 2.

⁷⁶ Tr. Vol. 6, 236-37.

⁷⁷ Ex. 121, p. 4.

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while Dr. Hadaway included Green Mountain Power and Duquesne Light Holding, two companies undergoing mergers, in his proxy group. KCPL's parent company, Great Plains Energy, is attempting to purchase Aquila, Inc., so including, rather than excluding, companies undergoing mergers seems more reflective of reality. A proxy group that is the largest submitted in this case, and that includes companies undergoing mergers, appears to more accurately reflect KCPL's current market risk, and is therefore more likely to assist the Commission in applying the standards enunciated in *Hope* and *Bluefield*.

In addition to finding Hadaway's testimony more credible than Barnes' and Gorman's, however, the Commission finds another more compelling reason to adopt the 10.75% ROE recommended by Dr. Hadaway. That reason is that the record is replete with other possible ROEs that the witnesses arrived at either by using their own analysis, by or changing variables in another witness' analysis, and those ROEs tend to congregate around 10.75%. For example, Dr. Hadaway's reference group shows a 10.5-10.8% ROE⁷⁸. His ROE recalculated using constant growth, based upon long-term forecasted growth in Gross Domestic Product, is a range of 10.7-10.8%.⁷⁹ His risk premiums associated with equity returns for 2006 shows an ROE of 10.6%.⁸⁰ If Staff witness Barnes had given any weight to CAPM, then Barnes' base ROE and construction adder should result in at least a 10.75% ROE.⁸¹ Mr. Gorman's constant growth DCF analysis showed a 10.7% ROE, and 10.6% ROE using Hadaway's comparables.⁸² Dr. Hadaway testified that had OPC witness Gorman not forced unreasonably low GDP growth into his two-stage DCF, the resulting average would have been 10.7% ROE.⁸³ Updating prices through August 24 and averaging long- and short-term growth rate estimates would yield a DCF estimate of 10.9%.⁸⁴ OPC witness Gorman fails to explain that in his own risk premium data, there is not one government bond risk premium as low as the 5.15% he recommends, and that his own data actually supports an ROE range of 10.5% to 11.0%.⁸⁵ Dr. Hadaway's updated DCF (Discounted Cash Flow) is a 10.6% to 11.1%.⁸⁶

⁷⁸ Ex. 11, pp. 5-6.

⁷⁹ Ex. 11, p. 36.

⁸⁰ Ex. 12, pp. 31-32.

⁸¹ Ex. 13, p. 2.

⁸² Ex. 201, p. 30; Sch MPG-5.

⁸³ Ex. 12, p. 4.

⁸⁴ *Id.* at p. 12.

⁸⁵ *Id.* at p. 13.

⁸⁶ Ex. 12, p. 15.

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Staff witness Barnes' CAPM analysis produces an estimated cost of common equity (ROE) of 11.33% for the comparables when using the long-term arithmetic average risk premium period, an estimated ROE of 9.92% using the long-term geometric average risk premium period, and an estimated ROE of 5.76% using the short-term risk premium period.⁸⁷ Mr. Barnes discounted the 5.76% because it was well below the current cost of utility debt.⁸⁸ Mr. Barnes prefers the geometric means, rather than an arithmetic means, to determine his risk premium, explaining the concept this way:

Suppose that an investor makes a \$1 stock investment over a three-year period. If an investor pays \$1 for a stock in year 1 and in year 2 the stock increases to \$1.50, then the investor would have a 50 percent growth rate. In year three, the price of the stock decreases by 50 percent to \$0.75. If an investor performed a simple arithmetic average of these two returns, then that investor would think that he/she received 0 percent $[(50 \text{ percent} + -50 \text{ percent})/2]$ growth in their investment over the three-year period. However, in reality, the investor actually had a 25 percent decline in his/her investment over this three-year period. This is why using the arithmetic mean is questionable.⁸⁹

However, Mr. Barnes admits that some people don't hold onto securities for long periods of time, and had he taken that into consideration and averaged his 11.33% long-term arithmetic average risk premium with his 9.9% long-term geometric average risk premium he would have arrived at a 10.63%.⁹⁰

Also, the Experimental Regulatory Plan, while allowing KCPL's credit metrics to stay at investment grade, thus pleasing the **bond** community, does not necessarily make KCPL more attractive to **equity** investors.⁹¹ Stockholders must have a reasonable opportunity for dividends. If those dividends come from additional amortizations, rather than cash earnings, the impact of paying those dividends on KCPL would essentially double.⁹² But, if KCPL instead uses the additional amortization money to help fund the construction contemplated by the Experimental

⁸⁷ Ex. 105, p. 20.

⁸⁸ Tr. Vol. 6, pp. 312-313.

⁸⁹ Ex. 107, pp. 4-5.

⁹⁰ Tr. Vol. 6, pp. 313-314.

⁹¹ Tr. Vol. 5, p. 108-110; Vol. 6, p. 273 (emphasis supplied).

⁹² Tr., Vol. 5, p. 108.

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Regulatory Plan instead of paying dividends it would otherwise pay, then KCPL's ability to raise further funds to support that construction would be virtually impossible due to the anticipated drop in the stock price.⁹³ As KCPL invests in Iatan 2, a coal-fired power plant in the first phases of construction, and other assets during the course of the Experimental Regulatory Plan, it likely would almost double its rate base.⁹⁴ With these factors in mind, the Commission finds that it should tilt the revenue requirement balance more towards traditional ratemaking revenue requirement, and away from additional amortizations, as requested by Staff, OPC, and some intervenors.

As far as KCPL's projected growth rate, contrary to OPC's view, the 6.6% figure that KCPL uses is actually weighted more toward recent history.⁹⁵ As Dr. Hadaway explained at the hearing, "(t)he 20-year average is included five times. And so we gave more weight to that more recent slightly lower inflation influenced GDP. That weighted average, then, is the bottom line there, the 6.6% forecast."⁹⁶

The final issue in return on equity is KCPL's requested "adder" of 50 basis point, or 0.5% additional ROE, requested due to the company's construction risk.⁹⁷ The level of risk that KCPL, and therefore KCPL investors, will endure during its Experimental Regulatory Plan is somewhat, although not completely, ameliorated by the additional amortizations KCPL may book. As Dr. Hadaway himself acknowledged, although the Experimental Regulatory Plan benefits primarily bondholders, it also has some lesser benefit to shareholders as well.⁹⁸ Dr. Hadaway identified companies with comparable investment grade bond ratings (at least "BBB") to KCPL to estimate its return on equity.⁹⁹ Based on a comparable risk proxy group with KCPL's bond rating, Dr. Hadaway estimated KCPL's return on equity to be 10.75%. Dr. Hadaway's proposal to add a 50-basis point return on equity adder to his proxy group return would provide KCPL an ROE higher than other utilities with the same bond rating. What is more, the Commission will remove considerable risk from KCPL's volatile off-system sales, as discussed below.

⁹³ *Id.* at Vol. 5, p. 129.

⁹⁴ Ex. 11, p. 5, Sch. SCH-1.

⁹⁵ See Ex. 11, p. 35; see also Ex. 13, pp. 10- 11.

⁹⁶ Tr. Vol. 6, pp. 228.

⁹⁷ Ex. 11, pp. 6-7; Tr. Vol. 6, p. 251.

⁹⁸ See *supra* at fn. 85.

⁹⁹ Ex. 11, p. 4.

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The Commission realizes this final ROE is lower than what it awarded KCPL last year. But such an award is in line with the rest of the nation, which has seen electric utility ROEs decline steadily over the past five years.¹⁰⁰ For these reasons, the Commission is of the opinion that KCPL's evidence does not warrant an upward adjustment of 50 basis points.

Conclusions of Law

The Commission must estimate the cost of common equity capital. This is a difficult task, as academic commentators have recognized.¹⁰¹ The United States Supreme Court, in two frequently cited decisions, has established the constitutional parameters that must guide the Commission in its task.¹⁰² In the earlier of these cases, *Bluefield Water Works*, the Court stated that:

Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the services are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.¹⁰³

In the same case, the Court provided the following guidance as to the return due to equity owners:

A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under

¹⁰⁰ Ex. 11, p. 31, Ex. 12, p. 5 (showing average return on equity awards for electric utilities being as follows: 2002 – 11.16%; 2003 – 10.97%; 2004 – 10.75%; 2005 – 10.54%; 2006 – 10.36%; 2007 (first two quarters) – 10.27%.

¹⁰¹ C.F. Phillips, Jr., *The Regulation of Public Utilities*, 390 (1993); Goodman, 1 *The Process of Ratemaking*, *supra*, at 606.

¹⁰² *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1943); *Bluefield Water Works & Improv. Co. v. Pub. Serv. Comm'n of West Virginia*, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1923).

¹⁰³ *Bluefield*, *supra*, 262 U.S. at 690, 43 S.Ct. at 678, 67 L.Ed. at 1181.

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efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.¹⁰⁴

The Court restated these principles in *Hope Natural Gas Company*, the later of the two cases:

'[R]egulation does not insure that the business shall produce net revenues.' But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.¹⁰⁵

The Commission must draw primary guidance in the evaluation of the expert testimony from the Supreme Court's *Hope* and *Bluefield* decisions. Pursuant to those decisions, returns for KCPL's shareholders must be commensurate with returns in other enterprises with corresponding risks. Just and reasonable rates must include revenue sufficient to cover operating expenses, service debt and pay a dividend commensurate with the risk involved. The language of *Hope* and *Bluefield* unmistakably requires a *comparative method*, based on a quantification of risk.

Investor expectations of KCPL are not the sole determiners of ROE under *Hope* and *Bluefield*; we must also look to the performance of other companies that are similar to KCPL in terms of risk. *Hope* and *Bluefield* also expressly refer to objective measures. The allowed return must be sufficient to ensure confidence in the financial integrity of the company in order to maintain its credit and attract necessary capital. By referring to confidence, the Court again emphasized risk.

The Commission cannot simply find a rate of return on equity that is "correct"; a "correct" rate does not exist. However, there are some numbers that the Commission can use as guideposts in establishing an appropriate

¹⁰⁴ *Id.*, 262 U.S. at 692-93, 43 S.Ct. at 679, 67 L.Ed. at 1182-1183.

¹⁰⁵ *Hope Nat. Gas Co.*, *supra*, 320 U.S. at 603, 64 S.Ct. 288, 88 L.Ed. 345 (citations omitted).

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return on equity. In the recent *Missouri Gas Energy* decision, the Commission stated that it does not believe that its return on equity finding should "unthinkingly mirror the national average."¹⁰⁶ Nevertheless, the national average is an indicator of the capital market in which KCPL will have to compete for necessary capital. The Commission described a "zone of reasonableness" extending from 100 basis points above to 100 basis points below the recent national average of awarded ROEs to help the Commission evaluate ROE recommendations.¹⁰⁷ Because the evidence showed the recent national average ROE for electric utilities is 10.27%, that "zone of reasonableness" for this case is between 9.27% to 11.27%.

Decision

The Commission finds that the appropriate return on common equity is 10.75%. KCPL's decreased risk due to the Kansas City Power & Light Company Experimental Regulatory Plan the Commission approved in Case No. EO-2005-0329 is not a factor that reduces the return on common equity otherwise appropriate for KCPL. Instead, the plan to keep KCPL's credit metrics at investment grade level largely benefits bondholders, while having little effect on stockholders.¹⁰⁸ KCPL's increased risk due to its large construction undertakings is not a factor that increases the return on common equity otherwise appropriate for KCPL because that construction risk is already factored into its return on equity.

2. *Capital Structure: What capital structure should be used for determining KCPL's rate of return?*

Discussion

A company must obtain cash generally in one of two ways; namely, it must borrow the money (debt), or it must receive an investment from its owners (equity). The percentage of money that company receives from lenders and from shareholders can be expressed as a "capital structure". For example, if a company has \$1000 cash, and obtained that \$1000 by borrowing \$600 and receiving \$400 in investments, its capital structure would consist of 60% debt and 40% equity.

The capital structure recommended by OPC contains less equity than does the structure recommended by KCPL and Staff. It costs a company more to issue equity than it does to incur debt. Therefore, a capital structure that uses a lot of debt with relatively low levels of equity is

¹⁰⁶ *In re Missouri Gas Energy*, 12 Mo.P.S.C.3d 581, 593 (Report and Order issued September 21, 2004).

¹⁰⁷ *Id.*

¹⁰⁸ Tr. Vol. 6, pp. 273-78.

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less expensive for the company. That means that, all else being equal, a capital structure that includes a low percentage of equity and a large percentage of debt will be less costly, resulting in a lower rate of return, and consequently a lower revenue requirement and lower rates to customers.

However, all else is not equal. Including a high percentage of debt in a capital structure has an effect on the cost of equity. The shareholders in a company – the holders of equity – are subordinate to bondholders. Generally, the company must pay the interest on debt, such as bonds issued by the company, before it can pay dividends to its shareholders, or before it can invest profits in other ways that benefit shareholders. If a company's income goes down, the risk is borne by the shareholders. Furthermore, if something really goes wrong and the company has to be liquidated, the holders of debt get paid first. The shareholders get only what, if anything, is left over. Therefore, a company with a capital structure that includes a high percentage of debt is more risky for shareholders. The shareholders will consequently demand a higher rate of return to compensate them for the increased risk caused by the high level of debt.

The composition of the capital structure and the embedded cost of the components other than common equity are not difficult to ascertain. It is simply a "snapshot" of a given moment in time. KCPL and Staff favor using Great Plains Energy's *actual* capital structure as of September 30, which had a consolidated capital structure that consisted of 57.62% common equity, 1.45% preferred stock, and 40.93% long-term debt.¹⁰⁹ OPC favors the capital structure that KCPL *projected* (incorrectly) that it would have as of September 30, which is 53.43% common equity, 1.33% preferred stock and 45.24% debt.¹¹⁰ The actual capital structure is more equity rich than the projected capital structure because KCPL did not complete an anticipated long-term debt issuance.¹¹¹

Findings of Fact

OPC witness Gorman says a capital structure should contain a reasonable balance of debt and equity.¹¹² The Commission agrees. OPC's hypothetical capital structure is not reasonable, though, because it does not reflect the reality of the capital structure of KCPL's parent company, GPE. The actual capital structure as of September 30, 2007 is known and measurable to all parties, and is thus a more reasonable structure than one does not even exist.

¹⁰⁹ Ex. 36, pp. 1-2; Ex. 125, pp. 1-2.

¹¹⁰ Ex. 210, p. 3 (referring back to KCPL's projected capital structure in its direct case).

¹¹¹ Ex. 36, p. 2.

¹¹² Ex. 210, p. 2.

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The Commission is mindful that KCPL did not issue the long-term debt it predicted it would issue before the end of the true-up period.¹¹³ While KCPL's capital structure is somewhat equity rich, worldwide credit concerns and the sub-prime mortgage crisis have prevented KCPL from issuing debt it would have otherwise issued.¹¹⁴ KCPL did not issue the long-term debt it anticipated issuing by now, but still plans on issuing it once it is prudent to do so.¹¹⁵ KCPL reacted properly to this past summer's credit crunch by not issuing the debt it had planned to issue.¹¹⁶ Therefore, the Commission will use the actual, rather than hypothetical capital structure, to set rates.

Conclusions of Law

As pointed out by the Court of Appeals, "(p)erhaps the ultimate authority for imputing debt and equity financing . . . is the Supreme Court's statement in *Hope Natural Gas*: 'The rate-making process under the Act, i.e., the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests.'¹¹⁷

Decision

The Commission rejects OPC's proposal, and finds that it should use KCPL's actual capital structure as of September 30, 2007, which is 57.62% common equity, 1.45% preferred stock, and 40.93% long-term debt.

3. Off-system sales margin:

a. *Should KCPL's rates continue to be set at the 25th percentile of nonfirm off-system sales margin as projected in this case for 2008 as proposed by KCPL, and accepted by the Staff, or at the 40th percentile as proposed by Public Counsel?*

b. *Should interest be calculated and flowed to ratepayers on the offsystem sales margin that exceeds the off-system sales margin level the Commission approved to be recovered in rates in Case No. ER-2006-0314?*

Discussion

In Case No. EO-2005-0329, the Commission approved a Stipulation among KCPL and the other signatory parties that contemplated

¹¹³ Ex. 36, p. 2; Tr. Vol. 15, pp. 1153-54.

¹¹⁴ Ex. 36, p. 4; Tr. Vol. 15, pp. 1151-54.

¹¹⁵ Tr. Vol. 15, pp. 1152-53.

¹¹⁶ *Id.* at p. 1160.

¹¹⁷ State ex. rel. Associated Natural Gas Co. v. Public Service Comm'n of Missouri, 706 S.W.2d 870, 879 (Mo. App. 1985)(citing *Hope Natural Gas*, 320 U.S. at 603, 64 S.Ct. at 288).

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an Experimental Regulatory Plan. Under the terms of the Stipulation, KCPL agreed that off-system energy and capacity sales revenues and related costs will continue to be treated "above the line" for ratemaking purposes.¹¹⁸ KCPL also agreed that it would not propose any adjustment that would remove any portion of its off-system sales from its revenue requirement determination in any rate case during the life of the Experimental Regulatory Plan. Despite this language in the Stipulation, OPC has a different view than KCPL and Staff of what amount of off-system sales should be included in KCPL's revenue requirement.

KCPL argues that the Commission should do as it did last year, and include KCPL's projected nonfirm off-system sales at the 25th percentile in its revenue requirement.¹¹⁹ The projected 25th percentile of nonfirm off-system sales is even less than last year's projection.¹²⁰ As of August of 2007, KCPL was not even halfway to last year's projected 25th percentile margin.¹²¹ As this past year has shown, if nonfirm off system sales had been set at the 50th or even 40th percentile, KCPL would likely be below investment grade today.¹²² To the extent KCPL makes sales in excess of that 25% level, those margins should be credited to ratepayers, as the Commission determined in the 2006 rate case.

KCPL witness Giles has testified that the Commission properly set rates at this level in 2006, in light of the risks facing the Company from the volatile markets in which it sells energy and capacity not needed to serve native load. He stated that prices in the marketplace have continued to decline in 2007 and, as supported by highly-confidential testimony, Mr. Giles states that it will be a significant challenge for the Company even to reach the 25% level this year.¹²³

Staff largely concurs in KCPL's position.¹²⁴ Further, it requests that any actual margin in 2008 that exceeds the 25th percentile should be deferred as a regulatory liability in a future rate case.¹²⁵ But Staff also

¹¹⁸ Off-system sales are sales made to customers other than KCPL's customers, with nonfirm sales being sales made on the spot market, rather than under contract. "Above the line" denotes revenue and expense items that enter fully and directly into the calculation of periodic net income, in contrast to below the line items that affect capital accounts directly and net income only indirectly.

¹¹⁹ Ex. 8, p. 8-10.

¹²⁰ *Id.* at p. 11.

¹²¹ Tr. Vol. 7, p. 533.

¹²² Ex. 9, p. 12.; Tr. Vol. 7, pp. 540-41.

¹²³ See Ex. 9, p. 12; Tr. Vol. 7, p. 533.

¹²⁴ Tr. Vol. 7, pp. 581-82.

¹²⁵ Ex. 113, p. 3.

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recommends Commission adopt OPC's tracking method called "cumulative until and after baseline is met."¹²⁶ Staff believes that an accumulated balance of margin should be recorded as pre-tax earnings until it reaches the 25th percentile.¹²⁷ All additional margins should be a regulatory liability. Finally, because the Commission did not put an interest adder in Case No. ER-2006-0314 for excess margin, the Staff does not support OPC's interest adder request.

In contrast, OPC lobbies for a 40th percentile point on Schnitzer's curve. OPC believes that KCPL may have a small incentive to exceed the 25th percentile due to an immediate, short-term cash flow benefit. However, that benefit would be offset by any refund of the excess margin it has to credit back to ratepayers in the future.¹²⁸ OPC reminds the Commission that KCPL likely already has in place several financing resources for the normal utility investments or costs this additional cash flow would support. Furthermore, if every dollar of additional nonfirm off-system sales margin above the baseline is to be refunded to ratepayers KCPL may perceive higher levels of margins to be contrary to its interest because they would help parties argue in future cases for a higher baseline or normalized amount.¹²⁹

OPC proposes that interest associated with excess margins be calculated by treating the balance as if it was earned on an even monthly basis over the course of the year and then applying an appropriate interest rate to each month's balance for the period from when it was earned until it is credited back to ratepayers.¹³⁰ OPC recommends prime interest plus 1%.¹³¹

Findings of Fact

KCPL sponsored the testimony of Michael Schnitzer, Director of the NorthBridge Group, Inc., a consulting firm for the electric and natural gas industry. Mr. Schnitzer's testimony focused on the risk KCPL faces in the off-system sales market, and offered a probabilistic analysis of what KCPL's non-firm off-system sales would be in 2008.¹³² In summary, KCPL witness Giles relied upon Mr. Schnitzer's analysis to form the opinion that the Commission should set the nonfirm off-system margin at the 25th percentile,

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Ex. 205, p. 9

¹²⁹ *Id.* at pp. 9-10.

¹³⁰ *Id.* at p. 13.

¹³¹ *Id.* at p. 18.

¹³² Ex. 22, 23.

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meaning that KCPL would have a 75% chance of achieving or exceeding the predicted level of those sales.¹³³

Not unlike KCPL's witness Dr. Hadaway, Michael Schnitzer possesses impressive qualifications: after receiving degrees from Harvard and Massachusetts Institute of Technology, Mr. Schnitzer has been in private industry consulting electrical and gas companies on strategic and economic issues since 1979.¹³⁴ The disagreement that OPC has with KCPL and Staff seems not to be with Mr. Schnitzer's analysis, but KCPL witness Giles' choice to pick the 25th percentile from among the probabilities.¹³⁵ OPC recommends that the Commission set off-system sales at a higher level. Those recommendations, if adopted, would place more into revenue requirement from off-system sales, thereby lessening the revenue to be collected from Missouri retail customers.

Mr. Giles chose the 25th percentile from Mr. Schnitzer's analysis due to the large portion of riskier, nonfirm off-system sales KCPL makes in comparison to less risky regulated sales.¹³⁶ As of August of 2007, KCPL was not even halfway to last year's projected 25th percentile margin.¹³⁷ As this past year has shown, if nonfirm off-system had been set at the 50th or even 40th percentile, KCPL would be below investment grade today.¹³⁸

OPC is understandably concerned about forced outages largely contributing to KCPL's unexpectedly low margin.¹³⁹ The Commission is concerned as well. But the major reason for reduced OSS margins in 2007 is not forced outages, but rather the drop in the price of electricity.¹⁴⁰ Projected electricity price levels for 2007 were based on estimates made in 2006. The price of electricity in 2007, however, averaged over \$10 per megawatt hour (MWh) less than in the prior year, mostly because of the drop in the price of natural gas.¹⁴¹

Another reason for decreased sales in 2007 was lower MWh sales volumes. This was mainly caused by an increase in KCPL's native load and an increase in forced outages.¹⁴² Despite those outages, KCPL's available generating capacity appeared to be consistent with national

¹³³ Ex. 8, p. 8; Tr. Vol. 7, p. 526.

¹³⁴ Ex. 22, Sch. MMS-1.

¹³⁵ Tr. Vol. 7, pp. 526-27.

¹³⁶ Ex. 8, p. 8.

¹³⁷ Tr. Vol. 7, p. 533.

¹³⁸ Ex. 9, p. 12.

¹³⁹ Ex. 211, pp. 4-5, 10-11.

¹⁴⁰ See Ex. 38, p. 2.

¹⁴¹ *Id.* at pp. 2-3; Ex. 38, Sch. BLC-1; Tr. Vol. 15, pp. 1254-55

¹⁴² See Ex. 38, pp. 2-3.

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averages in 2007.¹⁴³ An example of a forced outage is the Hawthorn 5 explosion, discussed later in this order, and the steam pipe explosion at latan 1.¹⁴⁴

In the portion of its off-systems sales discussion in the Report and Order in Case No. ER-2006-0314, the Commission pointed out that the probability of an event occurring, or not occurring, was not the end of the analysis. In addition, the Commission concluded that an event's importance should weigh heavily as the Commission contemplates what to do.¹⁴⁵ In other words, in deciding what level of projected off-system sales to put into revenue requirement, the Commission believed it was wise to not just look at sheer percentages, but what benefit or harm would accrue to what stakeholders should KCPL succeed, or fail, to attain a certain level of off-system sales. The Commission not only adopts that same analysis, but does so in recognition of the fact that KCPL has little, if any, chance to hit even the projected 25th percentile of sales in 2007.

Under the Experimental Regulatory Plan, KCPL has the option to file a rate case again on February 1, 2008. KCPL now plans to wait until April or May of 2008 to file that case.¹⁴⁶ That means that any rates decided in this case likely will be in effect for only approximately one year. Consequently, although Missouri ratepayers would not receive the benefit of corresponding rate base reduction from a higher amortization, *in the short term*, Missouri ratepayers are not harmed by the 25th percentile scenario presented by KCPL, especially in light of the fact that the Commission will order KCPL to account for any sales over that 25th percentile and to flow them back to ratepayers, as KCPL witness Giles suggested. In contrast, the potential importance of not achieving that level during a time when KCPL will be issuing equity and investing hundreds of millions of dollars in infrastructure construction and upgrades could be disastrous to KCPL.¹⁴⁷ The Commission need only look to KCPL's current situation of off-system sales margin to see that even the 25th percentile can be difficult to achieve.

In short, in balancing the interests of shareholders and ratepayers, straying from KCPL's recommended 25th percentile might benefit ratepayers some, but might also damage KCPL much, much more than any benefit that

¹⁴³ Tr. Vol. 15, p. 1264.

¹⁴⁴ *Id.* at p. 1273, 1276, 1279.

¹⁴⁵ *In re KCPL*, Commission Case No. ER-2006-0314, Report and Order, p. 34-36 (December 21, 2006).

¹⁴⁶ Ex. 8, p. 4.

¹⁴⁷ Tr. Vol. 5, p. 107. See also Stipulation and Agreement, App. B, Case No. EO-2005-0329 (filed March 28, 2005)

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might accrue to ratepayers. The Commission will adopt KCPL's position, with the added requirement that KCPL must file monthly monitoring reports on its nonfirm off-system sales with the Commission's Staff.

Conclusions of Law

There are no additional conclusions of law for this issue.

Decision

KCPL's rates should continue to be set at the 25th percentile of nonfirm off-system sales margin as projected in this case for 2008 as proposed by KCPL, and accepted by the Staff, and not at the 40th percentile as proposed by Public Counsel. KCPL shall continue to book all amounts above the 25th percentile as a regulatory liability, with no corresponding regulatory asset should sales fail to meet the 25th percentile, as ordered in Case No. ER-2006-0314. KCPL shall pay a short-term interest rate of LIBOR¹⁴⁸ plus 32 basis points on all margin amounts exceeding the 25% level, with the interest paid not charged to ratepayers in cost of service. Any margins in excess of the 25th percentile, and any interest paid on those margins, shall be returned to the ratepayers no later than the conclusion of "Rate Filing #4" as defined in Paragraph III.B.3.d on page 41 of the Stipulation and Agreement approved in Commission Case No. EO-2005-0329. KCPL shall report its monthly nonfirm off system sales margins to the Staff of the Commission each month.

4. What, if any, additional amortization is required by KCPL's Experimental Regulatory Plan approved by the Commission in Case No. EO-2005-0329?

Discussion

In last year's rate case, the parties disagreed on many issues but, at the end of the day, agreed that once the Commission made its decisions on revenue requirement, the parties agreed how to calculate the additional amortization described in the Experimental Regulatory Plan Stipulation and Agreement from Case No. EO-2005-0329. This year, however, the parties disagree on whether short-term debt should be included in the calculation.

KCPL states that it will need another \$14,155,968 million in amortization expense.¹⁴⁹ Staff disagrees with KCPL's final number, but Staff and KCPL agree that short-term debt and its expense should be

¹⁴⁸ London Interbank Offered Rate. It is a daily reference rate based on the interest rates at which banks offer to lend unsecured funds to other banks in the London, England interbank market.

¹⁴⁹ Ex. 36, Sch. MWC-9; Tr. Vol. 15, pp. 1178-80.

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included in the calculation.¹⁵⁰ KCPL avers that short-term debt expense was erroneously omitted from previous calculations, in part, because the figure was not viewed as material.¹⁵¹ However, given the financial turmoil of recent months and KCPL's inability to fulfill its plan to issue a large amount of hybrid debt because of unfavorable market conditions, the amount of short-term debt -- \$259 million -- was material and its costs were properly included in the Additional Amortizations calculation.¹⁵²

According to OPC, KCPL, with Staff's concurrence, has proposed to add a new line to the calculation and use short-term debt interest as an offset to Missouri jurisdictional revenue when calculating the coverage ratios. In all the many times the parties have calculated amortizations for KCPL (as well as similar amortization calculations for cases involving The Empire District Electric Company), short-term-debt interest has never been used as such an offset, and it is not shown as such an offset in the appendices to the Stipulation and Agreement in Case No. EO-2005-0329.

Findings of Fact

There are two regulatory metrics that are calculated to determine whether or not a Regulatory Plan Amortization (RPA) is necessary. Both of these metrics (or ratios) compare Funds from Operations (FFO) to another number. The FFO is used in the numerator in both comparisons and the denominator is either Adjusted Interest Expense or Adjusted Total Debt. The comparison of FFO to Adjusted Interest Expense is referred to as FFO Interest Coverage and the comparison of FFO to Adjusted Total Debt is referred to as FFO as a Percent of Average Total Debt. The second of these credit metrics, FFO as a Percent of Average Total Debt, is driving the need for additional amortization.

These two metrics were based on metrics that Standard and Poors (S&P), a credit rating agency, had in place at the time the Stipulation and Agreement in Case No. EO-2005-0329 was negotiated, but they will not change even if S&P changes its metrics -- unless the parties agree to make a change. No party in this case has proposed to change the metrics; KCPL asserts that it is simply adding a step that was omitted from the Stipulation and Agreement in Case No. EO-2005-0329 because of an "oversight" on KCPL's part.¹⁵³

¹⁵⁰ Tr. Vol. 15, p. 1196.

¹⁵¹ *Id.* at 1178-80.

¹⁵² Tr. Vol. 15, pp. 1179-80, 93. The exact amount of the short-term debt is \$258,647,000, found on Line 37 of both KCPL's calculation in Cline Schedule MWC-9 and Staff's calculation in Ex. 214.

¹⁵³ Tr. Vol. 15, pp. 1178-79.

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Appendix F-3 to the Stipulation and Agreement in Case No. EO-2005-0329¹⁵⁴ shows a calculation of the FFO along with the calculation of the Adjusted Interest Expense and the FFO as a Percent of Average Total Debt. The FFO calculation is calculated on lines 17 through 35. This calculation makes up the first section of the RPA calculation.

The second and third sections of the RPA calculation set out other information needed to calculate total interest costs and debt balances. These are used to determine the denominator in the metric (ratio) calculation. The fourth section calculates the current metric ratios and the fifth section calculates the necessary cash flows on a pre-tax basis. The final section calculates the necessary cash flows including income tax effects.

Short-term debt interest expense is shown on line 45 and used on lines 63 to determine Adjusted Interest Expense, which in turn, is the denominator used to calculate the FFO Interest Coverage ratio on line 67 and FFO as a Percent of Average Total Debt on line 68. Short-term debt interest is not included anywhere in lines 17 through 35 of Appendix F-3.¹⁵⁵ This format was followed in Case No. ER-2006-0314 when short-term debt was \$80M on a total company basis and Missouri's allocated share of interest expense was \$3,547,000.¹⁵⁶ Including this amount of short-term interest in the calculation of FFO in the prior case would have resulted in an amortization increase of approximately \$5.7 million (\$3,547,000 times a 1.62 income tax gross-up factor). KCPL witness Cline quickly calculated the amount to be "in the \$5 million range."¹⁵⁷ OPC believes that \$5.7 million is a material amount, and that KCPL witness Cline's refusal to answer the question of whether it was material simply lacks credibility.¹⁵⁸

Appendix F-3¹⁵⁹ and the language in paragraph III.B.1.i¹⁶⁰ of the Experimental Regulatory Plan Stipulation and Agreement clearly references "Missouri jurisdictional revenue requirement" as discussed by OPC witness Trippensee in his true-up rebuttal testimony and subsequent cross-examination. Short-term debt interest is not included in the revenue requirement because short-term debt is included in the calculation of

¹⁵⁴ Ex. 44.

¹⁵⁵ Ex. 44.

¹⁵⁶ Ex. 213.

¹⁵⁷ Tr. Vol. 15, pp. 1182-83.

¹⁵⁸ Tr. Vol. 15, pp. 1179-80.

¹⁵⁹ Ex. 44.

¹⁶⁰ Ex. 43.

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Allowance for Funds Used During Construction (AFUDC) on Construction Work in Progress (CWIP). No party disagreed with this concept.

The Commission is persuaded by OPC witness Trippensee, who has some thirty years regulatory experience, when he states that the primary reason that short-term debt is not normally included in the capital structure used to determine revenue requirement is because short-term debt is used to support CWIP (construction work in progress), and the related interest cost is capitalized and subsequently built into rates via the process referred to in the Uniform System of Accounts as Allowance for Funds Used During Construction (AFUDC). The result is that when the CWIP becomes plant-in-service, the total original cost will include AFUDC which, in turn, includes the short-term interest cost. Stated another way, the short-term interest costs are capitalized and included in future rate cases as depreciation expense and as rate base upon which a return is earned. Including short-term interest costs in the revenue requirement would result in double recovery of those costs. Only in the event that short-term debt balances exceed CWIP investments would it be appropriate to consider the increment short-term debt costs in the revenue requirement. That clearly is not the case with KCPL and its large construction program. Likewise, KCPL's evidence that this last-minute attempt to insert short-term debt interest into the amortization calculations this year is because of an "omission" is less credible than OPC's evidence because KCPL could not state what dollar amount of such an omission would rise to the level of being a material enough omission to include in revenue requirement.¹⁶¹

The Stipulation and Agreement in Case No. EO-2005-0329 is a contract. KCPL's position now is analogous to someone entering into a contract to lease a car, and partway through the lease period saying that free gas should be included, even though free gas is not mentioned in the lease contract.

Conclusions of Law

There are no additional conclusions of law for this issue.

Decision

The Commission finds this issue in favor of OPC. Any additional amortization that is required by KCPL's Experimental Regulatory Plan approved by the Commission in Case No. EO-2005-0329 shall be calculated by using the method sponsored by OPC, and shall not include short-term debt, as requested by KCPL.

¹⁶¹ Tr. Vol. 15, pp. 1179-80.

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Rate Base

Rate base is the second step in determining revenue requirement. According to the Stipulation and Agreement as to Certain Issues filed by KCPL and Staff, the rate base issues in this case are settled. Thus, other than approving that stipulation, the Commission has no need to resolve any rate base issues.

Allowable Operating Expenses

The final variable in the revenue requirement equation that the Commission must resolve is what expenses are prudent, and therefore should be included in KCPL's cost of service.

5. *Hawthorn 5 Subrogation Proceeds: Should subrogation proceeds KCPL received in 2006 concerning the 1999 Hawthorn 5 boiler explosion litigation be included in cost of service for setting KCPL's rates?*

a. *If so, should the five-year amortization period proposed by Staff be adopted?*

Discussion

In 1999, a boiler explosion occurred at Hawthorn 5, removing the unit from service until it was rebuilt and returned to service in 2001.¹⁶² In 2001, KCPL and its insurers filed suit against twelve defendants to recover costs related to the explosion. After extensive litigation, a defendant paid KCPL some \$38.9 million in 2006.¹⁶³ KCPL does not expect to receive any additional subrogation proceeds.¹⁶⁴ The issue here is the way KCPL booked some \$23.1 million of the proceeds.¹⁶⁵ Staff proposes a five-year amortization of those proceeds, which would translate into a \$4.6 million decrease in this year's revenue requirement.

KCPL argues that the proceeds of litigation have nothing to do with the test year, and that it is mere happenstance that KCPL received money during the test year for the 1999 Hawthorn 5 explosion. KCPL's theory is that its ratepayers never paid for cost of replacement power and property damages because KCPL did not ask for a rate increase during or after the outage that resulted in recovery of replacement power costs.¹⁶⁶ According to KCPL, both Staff and DOE are requesting retroactive ratemaking, which is forbidden, under the theory that KCPL must have been earning too much or it would've asked for a rate increase during the Hawthorn 5 litigation.

¹⁶² Ex. 108, p. 4; Tr. Vol. 5, p. 161.

¹⁶³ Ex. 108, p. 4.

¹⁶⁴ Tr. Vol. 5, p. 176.

¹⁶⁵ Ex. 108, p. 4.

¹⁶⁶ Tr. Vol. 5, p. 162.

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DOE states that KCPL's position is inconsistent. KCPL wants non-recurring revenue items excluded from cost of service, but non-recurring expenses included. DOE is simply seeking symmetrical treatment of all non-recurring costs and revenues.¹⁶⁷

Staff reminds the Commission that a company is assumed to recover its expenses and earning a reasonable return until it files for a rate increase.¹⁶⁸ Because KCPL did not ask for a rate increase while Hawthorn 5 was offline, customers were therefore paying those costs during that time. Also, Staff suggests that KCPL didn't file a rate case because KCPL was earning a robust ROE for those years; data requests responses show that KCPL's return on equity percentages were: 2002-12.85%; 2003-14.64%; 2004-14.66%; 2005-12.82%; 2006-11.82%.¹⁶⁹ Because the subrogation proceeds were received during the test year, they are properly included in this case. Rather than totally excluding the \$23.1 million from cost of service, or putting it all in, sharing the benefits is the wisest course.¹⁷⁰ Shareholders get interest free use of the funds over the five years. Staff asserts that the Commission should give five-year amortization, and no rate base treatment, to subrogation proceeds.

Findings of Fact

The Commission finds this issue in favor of KCPL. Staff argues that because KCPL did not file a rate case until 2006, the cost of operating Hawthorn 5 remained in KCPL's rates during the 1999 – 2001 outage, that KCPL thereby recovered the cost of operating the plant during that time, and that including Hawthorn 5 in rates during that time was somehow tantamount to a windfall for KCPL. However, as testified to by Mr. Giles, KCPL "incurred about \$150 million in purchase power expense above what would have normally been incurred had Hawthorn been operating."¹⁷¹ As a result of these expenses and other expenses related to the explosion, the expenses associated with Hawthorn 5 outage were greater than any savings KCPL may have realized by virtue of Hawthorn 5 not operating.¹⁷²

The timing of the proceeds of litigation happened coincidentally during the test year for this case. The proceeds are an unusual non-recurring event, were exceeded by KCPL's costs to purchase power to

¹⁶⁷ Ex. 801, p. 15.

¹⁶⁸ Ex. 109, p. 6.

¹⁶⁹ *Id.* at p. 8.

¹⁷⁰ Ex. 109, p. 12.

¹⁷¹ Tr. Vol. 6, p. 161.

¹⁷² Tr. Vol. 6, p. 128, 168, 170-71.

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replace the power KCPL would have otherwise generated with Hawthorn 5, and should be excluded from the test year.

Conclusions of Law

There are no additional conclusions of law for this issue.

Decision

The Commission adopts KCPL's position, and concludes that subrogation proceeds KCPL received in 2006 concerning the 1999 Hawthorn 5 boiler explosion litigation should not be included in cost of service for setting KCPL's rates.

6. *Long-term Incentive Compensation: Should the costs of KCPL's and GPE's long-term incentive compensation plans be included in cost of service for setting KCPL's rates?*

Discussion

KCPL witness Michael Halloran, a consultant with Mercer Human Resource Consulting, testified that the uses of short-term and long-term incentives are powerful tools to benefit both customers and shareholders. The use of financial measures is a very effective way to reflect performance on a broad range of customer service measures. In particular, a program that focuses on the achievement of Earnings Per Share is beneficial for customers and shareholders.¹⁷³ The theory is because KCPL is a regulated public utility, the organization is committed to its responsibility to achieve its EPS through the provision of efficient, clean, safe and affordable electricity. Therefore, EPS is an important measure of performance and productivity in areas related to product and service delivery.¹⁷⁴

Through the testimony of witness Dittmer, The U.S. Department of Energy objects, stating that incentive compensation linked to EPS should be eliminated from cost of service.¹⁷⁵ It again claims that KCPL is inconsistent; KCPL wants non-recurring revenue items excluded from cost of service, but non-recurring expenses included. Also, DOE lists several Commission orders from roughly the last decade or so, not the least of which was KCPL's rate case from last year, in which the Commission denied a company's request for incentive compensation because the goals of that compensation were tied primarily to shareholder wealth maximization.¹⁷⁶

¹⁷³ Ex. 14, pp. 3-5.

¹⁷⁴ *Id.* at p. 3.

¹⁷⁵ Ex. 801, pp. 2, 7-8.

¹⁷⁶ In the Matter of Union Electric Company, 29 Mo.P.S.C. (N.S.) 313, 325; In the Matter of Southern Union Company, doing business as Missouri Gas Energy, 5 Mo.P.S.C.3d 437, 458;

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In addition to concurring in DOE's arguments, Staff maintains that KCPL would pay that compensation with stock, not cash, so KCPL would not need to recover money from the ratepayers to pay the compensation.¹⁷⁷

Findings of Fact

KCPL has the right to tie compensation to EPS. However, because maximizing EPS could compromise service to ratepayers, such as by reducing maintenance, the ratepayers should not have to bear that expense.¹⁷⁸ What is more, because KCPL is owned by Great Plains Energy, Inc., and because GPE has an unregulated asset, Strategic Energy L.L.C., KCPL could achieve a high EPS by ignoring its Missouri ratepayers in favor of devoting its resources to Strategic Energy. Even KCPL admits it is hard to prove a relationship between earnings per share and customer benefits.¹⁷⁹ Nevertheless, if the method KCPL chooses to compensate employees shows no tangible benefit to Missouri ratepayers, then those costs should be borne by shareholders, and not included in cost of service.

Conclusions of Law

There are no additional conclusions of law for this issue.

Decision

The costs of KCPL's and GPE's long-term incentive compensation plans should not be included in cost of service for setting KCPL's rates.

7. Short-term Executive Compensation: Should part of the costs of KCPL's and GPE's short-term executive compensation plans be excluded from cost of service for setting KCPL's rates?

Discussion

KCPL's argument for including short-term executive compensation in rates is much the same as its argument for long-term incentive compensation.¹⁸⁰ Staff argues that EPS is not relevant to providing cash to serve ratepayers, because that cash is recovered from ratepayers via a normal level of maintenance expense.¹⁸¹ DOE largely concurs in Staff's

In the Matter of Southern Union Company, doing business as Missouri Gas Energy, 12 Mo.P.S.C.3d 581, 606-7; In re Kansas City Power & Light Company, Commission Case No. ER-2006-0314, Report and Order (December 21, 2006).

¹⁷⁷ Ex. 112, pp. 30-31.

¹⁷⁸ Ex. 801, p. 8.

¹⁷⁹ Tr. Vol. 5, p. 156-57.

¹⁸⁰ Ex. 14.

¹⁸¹ Tr. Vol. 5, pp. 184-85.

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position, and points out that such compensation is not tied directly to specific goals and therefore not related to any ratepayer benefits.¹⁸²

Findings of Fact

KCPL was understandably proud to tout its "Tier 1" standing of excellence, and its' "Edison Award" as evidence of customer service excellence which purportedly translates into customer benefits. But KCPL's witness was unsure precisely who placed KCPL in that tier, or what the tier or award even means.¹⁸³ The Commission finds that the relationship between KCPL and GPE's short-term executive compensation plans and benefits to KCPL ratepayers is simply too tenuous to include in cost of service.¹⁸⁴

Conclusions of Law

There are no additional conclusions of law for this issue.

Decision

The Commission rejects KCPL's position, and adopts the position of Staff. Part of the costs of KCPL's and GPE's short-term executive compensation plans should be excluded from cost of service for setting KCPL's rates.

8. *Talent Assessment Program Employee Severance Cost: Should the severance and other associated costs of KCPL employees terminated under KCPL's talent assessment program be included in cost of service for setting KCPL's rates?*

a. *If so, should the costs be recognized in cost of service using KCPL's proposed deferral and amortization to expense over five years?*

Discussion

KCPL states that it has incurred two distinct sets of severance costs during the test period. The first set is severance payments, outplacement service costs, and payroll taxes of 119 Company employees who left the Company as a result of the Talent Assessment Program. The second set is severance costs KCPL has incurred in the past, for which it requests to recover a three-year average.¹⁸⁵

Staff proposes that the severance payments related to the Talent Assessment Program be disallowed. Staff argues:

¹⁸² Ex. 801, p. 11.

¹⁸³ Tr. Vol. 5, pp. 143-46.

¹⁸⁴ Tr. Vol. 5, p. 157 (wherein KCPL witness Halloran admits it's hard to prove a direct relationship between incentive compensation and ratepayer benefit).

¹⁸⁵ Ex. 2, pp. 2-3.

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(1) There is no evidence that KCPL was not providing safe and adequate service with the employee base that existed prior to the talent assessment severance program;

(2) There is no evidence that the costs of this talent assessment program has yet or will ever provide any benefit to KCPL's customers;

(3) KCPL's management is responsible for the hiring of employees and training of employees. If the employees who were terminated under this program did not meet KCPL's management's performance expectations, then KCPL's management should bear the primary responsibility for this result;

(4) Severance costs of the talent assessment program were removed from KCPL's 2006 earnings in the determination of KCPL's management incentive compensation.¹⁸⁶

Findings of Fact

In the autumn of 2005, management employees were identified under this program as "Role Models," "Well Placed," or "Not Keeping Pace." Employees identified as "Not Keeping Pace" could either attempt to improve any shortcomings, or could voluntarily separate their employment with the Company.¹⁸⁷ Employees who did not improve their performance either voluntarily separated their employment, or were involuntarily separated effective on or before March 31, 2006. All employees identified as "Not Keeping Pace" were given the opportunity to receive severance payments under this program.

When a company improves the performance of its employees, both the shareholders and ratepayers benefit. Common sense dictates that a company that is run more efficiently makes more money, at least in part because a higher level of efficiency results in happier customers. Indeed, the record is replete with evidence that KCPL's customer service is excellent.¹⁸⁸ What is more, KCPL's ranking among Midwestern public utilities rose from eighth to fourth in 2006, according to a J.D. Powers and Associates survey, with those rankings measuring such components as power quality and reliability and customer service.¹⁸⁹

While Staff understandably points to the loss of experience KCPL will suffer due to several veteran employees leaving, KCPL reasonably assessed that it did not need the type of experience that those employees

¹⁸⁶ Ex. 108, p. 7.

¹⁸⁷ *Id.* at p. 3.

¹⁸⁸ Tr. Vol. 4, pp. 20-21, 33, Tr. Vol. 7, pp. 470-71, 498.

¹⁸⁹ Ex. 109, p. 17. Tr. Vol. 7, p. 468.

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had. KCPL's Talent Assessment program was a prudent way to attempt to reshape its corporate culture away from the decades-old mindset of encouraging electricity use, and then building or buying supply to meet that demand, and towards a mindset of a utility also concerned with some new goals articulated in the Experimental Regulatory Plan, including generating energy via wind, conserving energy altogether, and reducing pollution.¹⁹⁰

Conclusions of Law

There are no additional conclusions of law for this issue.

Decision

The Commission finds this issue in KCPL's favor. The Commission concludes that the Talent Assessment costs should be recognized in cost of service and deferred and amortized to expense over five years.

9. *Employee Severance Cost: Should the severance costs of KCPL employees terminated for reasons other than KCPL's talent assessment program be included in cost of service for setting KCPL's rates?*

a If so, is it appropriate to include a three-year average of those costs?

Discussion

KCPL states that it incurs routine and recurring severance costs due to changing job requirements, corporate reorganizations, and downsizing.¹⁹¹ Severance payments are a helpful and legitimate business tool to ensure that the Company has the human capital capable of delivering outstanding, reliable service at reasonable prices. These costs should be included in rates since such costs are necessary in order to hire and retain the appropriate employees within the organization to implement the Company's strategic goals and continue to achieve Tier I levels for cost, reliability and customer service. KCPL is requesting that a three-year average of severance payment amounts be included in the revenue requirement as representative of its ongoing level of severance costs.¹⁹²

Staff argues that KCPL incurred these severance costs to protect shareholders and they did not have the effect of decreasing payroll; therefore, these costs should not be included in cost of service.¹⁹³ Staff reminds the Commission that KCPL made this same proposal in its 2006 rate case, Case No. ER-2006-0314, the Commission rejected it, and that

¹⁹⁰ Ex. 2, pp. 6-7.

¹⁹¹ *Id.* at p. 8.

¹⁹² *Id.*

¹⁹³ Ex. 108, p. 5-6.

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KCPL has not provided anything new to persuade the Commission to change a position it took less than 12 months ago.

Findings of Fact

As it found in KCPL's last rate case, the Commission again finds that these severance costs largely protect shareholders against litigation, and they did not have the effect of decreasing payroll; therefore, these costs should not be included in cost of service. KCPL did not seek to eliminate those positions and, indeed, the pay for those positions was still being recovered from ratepayers in rates. In fact, KCPL is increasing payroll, not decreasing it.¹⁹⁴

Conclusions of Law

There are no additional conclusions of law for this issue.

Decision

The severance costs of KCPL employees terminated for reasons other than KCPL's talent assessment program should not be included in cost of service for setting KCPL's rates.

10. Department of Energy Nuclear Fuel Overcharge Refund: Should the Department of Energy Nuclear Fuel Overcharge Refunds for 1986 through 1993 KCPL received during the test year in this case be included in KCPL's cost of service for setting KCPL's rates?

a. If so, should the five-year amortization period proposed by Staff be adopted?

Discussion

The United States Department of Energy overcharged KCPL for uranium enrichment services from 1986 until 1993. KCPL filed a lawsuit against DOE to recover the amount KCPL was overcharged. The lawsuit ultimately settled and in December 2006, KCPL accrued \$427,150 for the settlement.¹⁹⁵

Similar to its argument against including Hawthorn 5 subrogation proceeds in cost of service, KCPL argues against including the fuel overcharge refunds in cost of service. It is no more appropriate to reach back beyond the test year, than it would be for the Company to reach back to recover expenses incurred between 1986 and 1993. In either case, the inclusion would constitute retroactive ratemaking.

Staff, on the other hand, continues with the same theory it had on the Hawthorn 5 issue, arguing that the Commission should presume KCPL

¹⁹⁴ Tr. Vol. 7, p. 406.

¹⁹⁵ Ex. 101, p. 46.; Ex. 9, p. 6.; Ex. 109, p. 12.

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recovered those overpayments from ratepayers in the rates it was charging ratepayers from 1986 to 1993. Staff insists the ratepayers paid KCPL the costs of the DOE overcharges because KCPL agreed to a rate reduction in 1994. The 1994 rate reduction must have included 1992-93 as part of its test year, and that time period was when KCPL was paying an excessive amount for nuclear fuel, and recovering that excessive amount from ratepayers.¹⁹⁶ As a result, in the rates set in this case based on a 2006 test year, ratepayers should receive a benefit from the Department of Energy Nuclear Fuel Overcharge Refunds for 1986 to 1993 that KCPL received in the 2006 test year by including the refunds in KCPL's cost of service in this case.

Findings of Fact

Just like the Hawthorn 5 issue, KCPL customers never paid the overcharges because KCPL did not have a rate case or a fuel adjustment clause during the period when these costs were incurred. The refunds do not pertain to the test year in this case, but were merely an atypical, unusual revenue KCPL happened to receive during the test year.¹⁹⁷

Conclusions of Law

There are no additional conclusions of law for this issue.

Decision

The Department of Energy Nuclear Fuel Overcharge Refunds for 1986 through 1993 KCPL received during the test year in this case should not be included in KCPL's cost of service for setting KCPL's rates.

Class Cost-of-Service and Rate Design

The rates that KCPL will be allowed to charge its customers are based on a determination of the company's revenue requirement. The Commission has resolved issues regarding revenue requirement; now, what remains is what class of customers must pay what share of that revenue requirement. This is a zero-sum game. If the Commission wants to remove a dollar's worth of revenue requirement responsibility from one customer class, it must assign that dollar to another customer class to keep revenue requirement the same.

11. Does the Stipulation and Agreement incorporating the KCPL Experimental Regulatory Plan that the Commission approved in Case No.

¹⁹⁶ Ex. 109, p. 13.

¹⁹⁷ Tr. Vol. 9, p. 656.

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EO- 2005-0329 allow the signatories to the Stipulation and Agreement to propose inter-class revenue shifts in this case?

a. If so, should any inter-class revenue shifts be implemented in this case?

Discussion

In beginning its rate design analysis, the Commission notes that much is made of language contained in a stipulation the Commission approved in Case No. EO-2005-0329, which is the genesis of this pending rate case. In that stipulation, the signatories agreed that in this rate case:

(iv) Rate Design. The Signatory Parties agree not to file new or updated class cost of service studies or to propose changes to rate structures in Rate Filing #2.¹⁹⁸

However, the parties have differing views of what that language means, and different definitions of exactly what "rate structures" are. To KCPL and OPC, the language means that any rate increase should be applied equally across all customer classes.¹⁹⁹ The Regulatory Plan's contemplation of additional amortizations makes the traditional revenue requirement, and the traditional ratemaking paradigm, inapposite for this rate case.²⁰⁰ Further, the extensive efforts and costs and minor benefits do not justify any rate design changes for this case. The rate case anticipated to be filed in 2009, when latan 2 is anticipated to be online, is the appropriate time to deal with rate design issues.

Staff and many intervenors disagree, claiming, *inter alia*, that the Commission can shift revenues or change charges to certain classes without the change rising to the level of proposing a change in rate structure, which is forbidden under the Experimental Regulatory Plan stipulation.²⁰¹ What is more, some parties in this rate case were not signatories to the stipulation in Case No. EO-2005-0329, and are thereby not bound by it.²⁰²

Findings of Fact

KCPL's different customer classes pay different rates of return.²⁰³ But different customer classes also have different levels in risk, with a large industrial or commercial customer being a riskier customer to serve than a

¹⁹⁸ Commission Case No. EO-2005-0329, *Stipulation and Agreement*, Paragraph III.B.3.b(iv), p. 25 (filed March 28, 2005).

¹⁹⁹ Ex. 19, p. 5, Ex. 204, pp. 3-4., Ex. 208, p. 2.

²⁰⁰ Ex. 209, p. 4.

²⁰¹ Ex. 111, pp. 7-8; Ex. 118, p. 2; Ex. 602, pp. 3-6; Ex. 701, p. 14; Ex. 804, pp. 4-7.

²⁰² DOE-NNSA and Trigen are parties in this case, and did not sign the stipulation. Ex. 804, p. 4; Tr. Vol. 13, p. 1055.

²⁰³ Tr. Vol. 11, p. 713, p. 931.

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residential customer because, for example, the industrial or commercial customer could close down or go bankrupt, thus depriving the company of revenue until rates are reset.²⁰⁴

The only substantive resistance KCPL puts up against Staff's position is that the EO-2005-0329 stipulation prevents anything other than an equal percentage increase to each class. In fact, KCPL admits that Staff "... continues the effort to levelize class revenues while maintaining the key elements of rate continuity established in the rate design effort that concluded in 1996. Further, the proposal is consistent in structure to the design approved in the ER-2006-0314 case."²⁰⁵ As will be discussed below, the Commission does not accept KCPL's and OPC's argument that anything other than an equal percentage increase among customer classes is required by the EO-2005-0329 stipulation. Therefore, the Commission must now address what the proper inter-class shift is.

The class cost of service and rate design witnesses have quite impressive credentials. KCPL witness Rush has an accounting degree and a Master of Business Administration degree.²⁰⁶ Staff witness Pyatte holds a baccalaureate degree and a master's degree in economics and has been employed by the Commission since June 1977.²⁰⁷ Notably, Ms. Pyatte has participated in the last three KCPL rate design and class cost of service studies, dating back to 1978.²⁰⁸ Staff witness Watkins has an undergraduate degree in economics, and lacks only a dissertation for a Ph.D. in Economics.²⁰⁹ He has taught economics at the collegiate level, and been on the Staff of the Public Service Commission since August 1, 1982.²¹⁰ DOE witness Price has a degree in electrical engineering, and has worked in utility industry some 35 years.²¹¹ OPC witness Meisenheimer has an undergraduate degree in Mathematics and has completed the comprehensive exams for a Ph.D. in Economics. She has taught economics and mathematics courses at several local colleges, and has performed analyses of class cost of service and rate design for OPC for over ten years.²¹² OPC witness Trippensee has an accounting degree, is a

²⁰⁴ Tr. Vol. 11, p. 781.

²⁰⁵ Ex. 20, p. 6.

²⁰⁶ Ex. 19, p. 1.

²⁰⁷ Ex. 111, p. 1.

²⁰⁸ *Id.* at p. 2.

²⁰⁹ Ex. 16, p. 1.

²¹⁰ *Id.*

²¹¹ Ex. 804, p. 1-3.

²¹² Ex. 204, pp. 1-2.

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Certified Public Accountant, and has been an accountant for either the Commission's Staff or OPC for roughly 30 years.²¹³

While all the class cost of service and rate design witnesses are quite qualified to give their testimony, and they all present compelling arguments, the Commission is most persuaded by Staff's position, due to Staff witness Pyatte's work on, and familiarity with, KCPL rate design issues since the 1970s.

The Commission concludes that it is just and reasonable to shift \$3,536,542 of current revenue responsibility from the Medium General Service class to the residential class. The Medium General Service class is a glaring problem, and the Commission is unsure how much of a problem, if any, the remainder of the classes' rate of return is.²¹⁴

The eight studies discussed in Ms. Pyatte's testimony show that, after the shift from MGS to residential customers agreed upon and ordered in last year's case, the residential class is still underpaying anywhere from .41% (2.41% - 2%) to 23.19% (25.19% - 2%).²¹⁵ Also, these same studies indicate that the Medium General Service class still bears anywhere from 8.30% (8.75% - 0.45% = 8.30%) to 11.46% (11.91% - 0.45% = 11.46%) extra revenue responsibility.

This decision will be a 5% decrease to Medium General Service, and a 1.8% increase to the residential class. As far as how this shift would affect residential customers, KCPL has approximately 233,632 Missouri residential customers.²¹⁶ While these new rates are in effect, the shift would amount to an average monthly residential customer bill increase of approximately \$1.26 per month.²¹⁷ The Medium General Service class has approximately 4,653 Missouri customers.²¹⁸ Shifting the \$3,536,542 away from them would save each MGS customer an average of \$63.34 per month.

This appears to be the most moderate position, and strikes a balance between no revenue shift at all between classes and DOE's

²¹³ Ex. 207, pp. 1-2.

²¹⁴ *Id.* at 976.

²¹⁵ Ex. 111, p. 5; Ex. 118, pp. 3-4. *See also In re KCPL*, Case No. ER-2006-0314, Report and Order, App. D (December 21, 2006) (the appendix being a Commission approved stipulation in last year's rate case which contemplated a class cost of service shift that increased residential rates by 2%, and reduced rates for other classes, including Medium General Service, by 0.45%.)

²¹⁶ Ex. 103, App. pp. 4-5.

²¹⁷ $\$3,536,542 / 233,632 \text{ customers} = \$15.14 \text{ annual increase} / 12 \text{ months} = \$1.26 \text{ per month increase.}$

²¹⁸ Ex. 103, pp. 4-5.

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proposal to shift more than twice as much revenue responsibility onto residential customers via a 3.76% increase to the residential class.²¹⁹ In fact, as it concerns the residential class, Staff's position is virtually a midpoint between the KCPL/OPC position and the DOE position.

As the Commission stated previously, a company receiving a higher return from one class than another is not necessarily charging unjust or unreasonable rates. But an abundance of evidence showing that the residential class is paying considerably less than its cost of service, coupled with what is sure to be a massive increase in rate base if latan 2 is placed into service when anticipated, mandates that the Commission continue shifting moderate portions of the revenue requirement onto residential customers.²²⁰ While no rate increase is completely painless, this inter-class shift of revenue responsibility amounts to only about \$1.25 per month per residential customer. The Commission understands OPC's argument that OPC's time-of-use study, the type of study that the Commission has previously approved, shows that no inter-class shift is appropriate. But even OPC stated that class cost of service studies are a **guide** to setting rates.²²¹

If the Commission fails to make this moderate shift now, the Commission as well as Missouri ratepayers, could be caught in a quandary. Waiting until latan 2 likely will be placed into rate base, and then foisting a much larger increase upon residential ratepayers, could be such a "rate shock" as to amount to rates that are not just and reasonable. On the other hand, mandating that commercial and industrial customers continue to pay an even higher rate of return than the already disproportionate rate of return that they are currently paying after latan 2 is in service could also result in rates that are not just and reasonable. Finally, forcing KCPL shareholders to pick up the tab for plant being used to serve ratepayers would likely be confiscatory and illegal; if the plant is used and useful to serve ratepayers, its prudent costs belong in cost of service.

The Commission will continue the course initiated last year of slowly moving towards rate parity among KCPL's customer classes by placing an additional, yet moderate amount of revenue responsibility upon the residential class.

²¹⁹ The 3.76% proposal was designated as Highly Confidential in Ex. 804, p. 11. However, DOE mentioned that percentage in its publicly filed post-hearing brief. See DOE/NNSA Post-Hearing Brief, pp. 44-45. Because DOE made the information publicly available, the Commission now considers that information public.

²²⁰ The Commission, per the parties' agreement, began such a shift in last year's case. See *id.*

²²¹ Tr. Vol. 11, p. 827 (emphasis supplied).

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Conclusions of Law

To attempt to support its position on the above-referenced language in the ERP Stipulation, Staff inserted some information gleaned during settlement negotiations in its prefiled testimony.²²² OPC and KCPL object, and ask the Commission to strike that portion of the testimony on the grounds that that information is privileged.²²³

The Supreme Court of Missouri has enunciated a two-step process for determining admissibility of evidence; the evidence must be both logically and legally relevant.²²⁴ The disputed testimony is logically relevant; that evidence tends to support Staff's interpretation of the meaning of the disputed language in the stipulation. But there is a second hurdle Staff must clear, which is legal relevance.

Legal relevance weighs the probative value of the evidence against its costs, including unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness. Thus, logically relevant evidence is excluded if its costs outweigh its benefits.²²⁵ Using this balancing test, the Commission will sustain the objections and motions to strike launched by OPC and KCPL and joined in by Praxair. The Commission finds the cost of admitting settlement negotiations far outweighs any benefits.

The complexity of the issues and the number of parties often involved in rate cases can be staggering. Parties regularly engage in settlement negotiations, sometimes resolving their disputes with "black box" settlements. That is to say, the many parties arrive at, for example, a final revenue requirement number that they all find acceptable. But that settlement does not reveal *how* the parties arrived at that number, who moved how many dollars on what issue, etc. Indeed, given the sometimes frantic pace of negotiations as the Commission's operation of law date approaches, and the many people involved, the parties may not *know* exactly how they arrived at that number, and one representative of a party may not *know* what another representative of a party has promised someone.

If these parties, who employ attorneys, accountants, economists, engineers, as well as several other experts, cannot engage in candid and frank settlement discussions without fear of those discussions being used against them, then the entire settlement process at the Commission could

²²² Ex. 111 (HC), pp. 9-11.

²²³ Praxair, Inc., also concurs with OPC's motion.

²²⁴ *State v. Anderson*, 76 S.W.3d 275, 276 (Mo. banc 2002).

²²⁵ *Id.*

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implode. Indeed, in the case at bar, despite the regulatory plan stipulation, a non-unanimous stipulation on pensions, and a non-unanimous stipulation regarding several rate base and expense issues, once sub-issues are counted as separate issues, this case has roughly thirty issues. If parties do not feel free to lay all of their cards on the table during settlement discussions, they could become even more entrenched in their positions. As a result, many more issues might the parties bring to the Commission for resolution.

Absent a statutory change, the absolute deadline for the Commission to resolve a rate case is fixed at 120 days plus six months beyond the tariff effective date.²²⁶ If the issues are not settled, the parties and the Commission would simply have to cram even more work and more issues into an already rather compressed time frame. Several weeks that are currently used for discovery and negotiation would instead have to be used for several weeks of hearings to accommodate the additional issues.

The Commission will not go down that road. The Commission will sustain the objections launched by OPC and KCPL regarding Staff's inclusion of settlement discussion in Staff witness Pyatte's testimony, and will strike from the record the portions of Ms. Pyatte's testimony to which OPC and KCPL objected.

In interpreting the disputed language of the prior stipulation, the Commission need look no further than its own orders approving similar stipulations. For instance, in Case No. ER-2001-299, the parties executed a Stipulation regarding class cost of service / rate design. In that Stipulation the parties agreed that any rate increase would be "allocated to each customer class on an equal percent of current revenues basis and reflected on all Empire Missouri rate schedules as an equal percentage increase (or decrease) to each rate component on each tariff."²²⁷ In approving the Stipulation, the Commission recognized "this approach as a means of essentially maintaining the same rate design as exists and is presently lawful and approved, since it increases each charge by an equal percentage basis."²²⁸

Another example proves that parties practicing before the Commission know how to draft language to implement an equal-percent rate increase. That example states that "(t)he Parties agree that the increase in the Company's revenue requirement shall be allocated to each

²²⁶ Section 393.150 RSMo. 2000.

²²⁷ See *In re The Empire District Electric Company*, Commission Case No. ER-2001-299, Report and Order, p. 21 (September 20, 2001).

²²⁸ *Id.*

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rate schedule on an equal-percent-of-current-revenues basis.”²²⁹ More recently, the parties to Case No. WR-2007-0216 also demonstrated an ability to implement an equal percent across the board rate increase. “No party opposed this portion of the rate design and from all appearances in Appendix A-1 of the Global Agreement, the parties agreed to maintain the status quo as evidenced by repeated references to the terminology of ‘equal percent class revenue increase/decrease.’”²³⁰

In short, the Commission finds that if the parties had intended the disputed language to mean an equal percentage rate increase to all classes, then they would have agreed upon language similar to what is discussed above, and not on something as open to interpretation as “rate structures.”²³¹ What is more, even *if* that language means an equal percentage shift, the Commission was not a party to that stipulation,²³² is not bound by it, and finds that just and reasonable rates would not result from ignoring the glaring differences in rate of return among the customer classes.

KCPL has the burden of proof to show that its proposed tariffs are just and reasonable, *including* the reasonableness of its rate design.²³³ Just because a company derives a higher rate of return from one class than another does not necessarily render those rates unjust or unreasonable.²³⁴ Class cost of service is often considered but a starting point in quantifying what part of the revenue responsibility is afforded to each customer class.²³⁵ Indeed, class costs of service studies are often considered more art than science.²³⁶ Other factors should be considered when establishing rates.²³⁷

²²⁹ See *In re The Empire District Electric Company*, Commission Case No. ER-2002-424, Report and Order, p. 6 (November 14, 2002).

²³⁰ See *In re Missouri-American Water Company*, Commission Case No. WR-2007-0216, Report and Order, p. 54 (October 4, 2007).

²³¹ Ex. 602, pp. 4-6.

²³² *In re KCPL*, Commission Case No. EO-2005-0329, Report and Order, p. 34 (July 28, 2005).

²³³ See, e.g., *State ex rel. Monsanto Company v. Public Service Commission*, 716 S.W.2d 791 (Mo. 1986) “Laclede filed the tariffs here in question using the existing rate design. In the suspension order and notice of proceedings dated January 18, 1983, the Commission noted that the Company bore the burden of proof before the Commission and ordered the Company ‘to provide evidence and argument sufficient for the Commission to determine . . . the reasonableness of the Company’s rate design.’” *Id.* at 795. See also *In re Empire District Electric Company*, Commission Case No. ER-2004-0570, Report and Order (March 10, 2005).

²³⁴ *Midwest Gas Users Ass’n v. Kansas SCC*, 595 P.2d 735, 747 (Kan. App. 1979).

²³⁵ *Shepherd v. City of Wentzville*, 645 S.W.2d 130, 133 (Mo. App. 1982)

²³⁶ *Associated Natural Gas Co.*, 706 S.W.2d at 880 (citing *United States v. Federal Communications Commission*, 707 F.2d 610, 618 (D.C.Cir. 1983).

²³⁷ *State ex rel. Associated Natural Gas Co. v. Public Service Commission of Missouri*, 706 S.W.2d 870, 879 (Mo. App. 1985) (citing *Southwestern Bell*

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It is up to the Commission to evaluate the testimony of expert witnesses and accept or reject any or all of any witness's testimony.²³⁸

Decision

The meaning of the disputed language from the Stipulation and Agreement in Case No. EO-2005-0329 allows parties to propose inter-class shifts. The proper inter-class shift is to move \$3,536,542 of current revenue responsibility from medium general service (MGS) to residential, resulting in a 5% decrease to the Medium General Service (MGS) class, and a 1.8% increase to the residential class.

12. Large Power Service Rate Design:

a. Does the Stipulation and Agreement incorporating the KCPL Experimental Regulatory Plan that the Commission approved in Case No. EO-2005-0329 allow the signatories to the Stipulation and Agreement to make rate design modifications within the Large Power Service rate schedule?

b. If so, what are the appropriate demand and energy charges for the Large Power Service rate schedule?

Discussion

Praxair recommends rate realignment, with Large Power Class energy charges being reduced, and demand charges being increased.²³⁹ This proposed rate realignment affects only the Large Power Service class, and no other class. Praxair states that energy charges in the Large Power Service rate should be reduced by 1.0 cent/kWh, which would put them near 1.4 cents/kWh, still above variable costs, with a concurrent increase on the demand charge.²⁴⁰ However, Praxair supports a non-specific

Telephone Company v. Arkansas Public Service Commission, 593 S.W.2d 434, 445 (Ark. 1980); *Shepherd v. Wentzville*, 645 S.W.2d 130 (Mo. App. 1982); *State ex rel. City of Cape Girardeau v. Public Service Commission*, 567 S.W.2d 450 (Mo. App. 1978); *Midwest Gas Users' Ass'n v. State Corp. Com'n*, 595 P.2d 735 (Kan. App. 1979); *Central Maine Power Company v. Public Utilities Commission*, 382 A.2d 302 (Me. 1978); *St. Paul Area Chamber of Commerce v. Minn. Public Service Commission*, 251 N.W.2d 350 (Minn. 1977); and *American Hoechst Corporation v. Department of Public Utilities*, 399 N.E.2d 1 (Ma.1980).

²³⁸ *Id.*(citing *In Re Permian Basin Area Rate Cases*, 390 U.S. 747,800, 88 S.Ct.1344,1377, 20 L.Ed.2d 312, (1968)).

²³⁹ Mr. Brubaker testified on behalf of Praxair, Inc., Ford Motor Company, and Missouri Industrial Energy Consumers. For brevity's sake only, these positions will be referred to as Praxair's position only. No disrespect is intended to any party, counsel or witness.

²⁴⁰ Ex. 601, p. 6.

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adjustment to prevent KCPL from suffering revenue loss due to customer migration.²⁴¹

Praxair continues by arguing that a lot of customer-related costs are not collected through the customer charge. Those costs would normally be recovered in the early blocks of a declining block demand structure, which is one reason to support declining block demand charges. Customers who take service at the substation or transmission level do not require as much distribution network as other customers, so there is less cost associated with serving them, and they should pay a lower demand charge.

KCPL states that to correct for the shift in revenues between classes that Praxair's proposal would cause, an adjustment is needed to correct for the deficiency. This recommended change will result in an increase to some customers of about 6.37%, and a decrease to others of up to 9.06%.²⁴² These shifts are before reflecting any change in rates due to the increase requested by the Company. KCPL states that Praxair's proposal would make many customers in the Large Power Service class move, and would require a revenue adjustment to make up for the deficiency. Further, most of those customers (75 out of 89) would not benefit from Praxair's proposal.²⁴³ A KCPL alternative proposal is if, and only if, the Commission decides to adopt Praxair's proposal, it should limit the change to a half cent per kWh for the first two blocks, then no decrease for the last.²⁴⁴

Staff argues that no change should be made to the Large Power Service class because Praxair's proposal would drop the energy rates below KCPL's incremental cost to provide that energy. As an alternative, Staff supports some of Praxair's proposals, as long as something is done to prevent customers switching from Large Power Service to Large General Service.²⁴⁵ Any reduction to existing energy rate values should be accomplished on a proportional or equal-percentage basis.²⁴⁶ Any offsetting increases to the demand rate values that result from reducing energy rate values should be applied so as to reduce or eliminate the declining block feature of the existing LPS demand charge.²⁴⁷ Any revenue reduction from customers presently being served on the Large Power

²⁴¹ Ex. 602, p. 6.

²⁴² Ex. 20, pp. 3.

²⁴³ Tr. Vol. 11, p. 737-38.

²⁴⁴ Tr. Vol. 11, p. 787-88.

²⁴⁵ Ex. 117, p. 3.

²⁴⁶ *Id.* at p. 6.

²⁴⁷ *Id.* at p. 7.

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Service rate schedule due to existing Large Power Service customers switching to the Large General Service rate schedule should be recovered from the remaining Large Power Service customers by proportionately increasing the demand and energy charges of the Large Power rate schedule.²⁴⁸

Findings of Fact

The Commission has already listed the credentials of KCPL witness Rush and Staff witness Watkins.²⁴⁹ Praxair witness Brubaker has graduate degrees in engineering and business administration. He has been in private industry, analyzing class cost of service and rate design, for over 35 years.²⁵⁰ All of these witnesses are extremely qualified to testify on this topic. For the reasons discussed below, the Commission chooses the KCPL and Staff proposal of no changes to the Large Power Service tariff.

Praxair's proposal would cause Large Power Service customers to migrate to Large General Service. To mollify the effects of this anticipated migration, Praxair supports some sort of "adjustment" to make KCPL whole.²⁵¹ But the Commission will not support such an adjustment, since it is unclear how large that adjustment would be, and who would pay what portion of it. Further, without that adjustment, KCPL could not collect its revenue requirement under Praxair's proposal.

In addition, the majority of Large Power Service customers, 75 out of 89, would be worse off under Praxair's proposal.²⁵² Finally, adopting Praxair's proposal would drop the energy charge for some blocks below incremental cost, which would thwart conservation efforts and encourage wasteful uses of electricity.²⁵³ Thus, the Commission will reject Praxair's proposal.

In addition, Staff's alternative proposal would seem to do more harm than good to Praxair and other high-load factor customers. For KCPL customers, energy usage (on a kWh basis) is charged in a sequential fashion. Energy is first billed at the initial 180 hour energy block rate; any usage in excess of this is billed at the second 180 hour energy block and finally, any remaining usage is billed at the tail block rate.²⁵⁴ In order to receive the benefit of the lower energy charges in the second energy block

²⁴⁸ *Id.*

²⁴⁹ See *supra*. at fn. 190, 193.

²⁵⁰ Ex. 601, App. A, pp. 1-3.

²⁵¹ Ex. 602, p. 6.; Tr. Vol. 11, p. 766.

²⁵² Ex. 20, p. 3; Tr. Vol. 11, pp. 739, 741-42.

²⁵³ Ex. 118, p. 9.

²⁵⁴ Tr. Vol. 11, pp. 755-56.

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and the tail block, customers must first fill the preceding blocks and pay for energy at the associated higher energy rate.²⁵⁵ Customers receiving service exclusively out of the first energy block have a load factor less than or equal to 25%.²⁵⁶ Given that these customers will usually take service only during the peak hours of the day when energy costs are higher (Monday – Friday, 8:00 a.m. through 5:00 p.m.), they are billed at a higher energy charge.²⁵⁷ Similarly, customers using enough energy to fill both the first and second energy block have a load factor of 50%.²⁵⁸ These customers will likely be taking energy during the same peak hours as well as some usage during evening and nights or weekends.²⁵⁹ Finally, customers using energy in excess of the second energy block will have a load factor in excess of 50% and will receive the benefit of the lowest energy charge. These customers are taking energy at the lowest cost off-peak periods experienced by the utility.²⁶⁰ Staff's alternative proposal to reduce or eliminate the declining block rate would take away the lower energy charges the high-load factor customers currently enjoy, and give no corresponding benefit.

KCPL's alternative suggestion would likewise not benefit Praxair and other high load factor customers. KCPL's fallback position is to lower the first and second energy blocks by 0.5 cents per kWh, with no reduction to the tail block. This alternative does nothing to help the large users on the LPS tariff because they will receive proportionately less of the benefit on the energy side. Furthermore, any benefit they receive on the energy side will be made up on the demand side without the benefit of the declining demand block; therefore leaving more of the demand side charges to be absorbed by the large users on the LPS tariff.

One overarching purpose of Praxair's proposal is to reduce the amount of fixed costs paid in the tail block energy rate, as opposed to the fixed costs paid in the other blocks' energy rates.²⁶¹ Spreading the energy charge reduction equally among the three energy rate blocks, which is Staff's proposal, would not alleviate the disparity of the fixed costs paid in the tailblock rate when compared to the other two blocks. Further, Staff's condition to eliminate the tailblock in the demand charge would require Praxair and other high-load factor customers to pay proportionately more of

²⁵⁵ Id. at p. 756.

²⁵⁶ Id. at pp. 756-57.

²⁵⁷ Ex. 601, p. 4.

²⁵⁸ Tr. Vol. 11, p. 757.

²⁵⁹ Ex. 601, p. 4.

²⁶⁰ Tr. Vol. 11, p. 757.

²⁶¹ Ex. 601, p. 5.

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the reduced energy charges than the other customers on the LPS tariff would pay.

A better, overall solution for the Large Power Service class is to continue the current course at the present time, with an eye towards the class cost of service study that the Commission has ordered KCPL to file in its next rate case, to see how to better align the Large Power Service rates, both within that class, and as compared to other customer classes.

Conclusions of Law

There are no additional conclusions of law for this issue.

Decision

The Stipulation and Agreement incorporating the KCPL Experimental Regulatory Plan that the Commission approved in Case No. EO-2005-0329 does allow the signatories to the Stipulation and Agreement to make rate design modifications within the Large Power Service rate schedule. Nevertheless, the Commission declines to make any modifications at this time. Therefore, the appropriate demand and energy charges for the Large Power Service rate schedule are in accordance with KCPL's current Large Power Service rate design.

13. General Service All-electric tariffs and general service separately-metered space-heating tariff provisions:

a. Should KCPL's general service all-electric tariff rates and separately metered space heating rates be increased more (i.e., by a greater percentage) than KCPL's corresponding standard general application rates and if so, by how much more?

Discussion

KCPL avers that no further adjustments should be made until a class cost of service study is completed. And, continuing its theme that the stipulation in Case No. EO-2005-0329 prevents such a study now, KCPL pushes for a delay of any class cost of service study, and thereby any inter-class revenue shift away from commercial and industrial commercials, until after the later 2 rate case is completed.²⁶²

Further, KCPL warns that adopting Trigen's position would increase all other customers' rates, since customers would likely leave KCPL for alternative heating sources, such as Trigen. As a result, KCPL will lose some of its electricity usage in off-peak periods and will have to increase

²⁶² Ex. 20, p. 11.

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rates to cover the fixed investments previously being recovered by the customers who leave the KCPL system.²⁶³

Both Trigen and Staff maintain that the separately-metered space heating rates should be increased by 10% on a revenue-neutral basis.²⁶⁴ But Trigen argues that Staff's position on all-electric tariff rates, while going in right direction, does not go far enough. Trigen believes the Commission should increase the all-electric tariff rates more than the associated standard general application rates so that *the difference* between the general service standard general application rates and the general service all-electric tariff rates is reduced by one-third.²⁶⁵ Trigen's hope is also for the next two rate cases to have a similar one-third reduction, thus putting the all-electric tariff customers at parity with the general service standard customers.

Staff witness Watkins, seeing no justification for continuing the non-residential, all-electric and separately metered space heating rates, proposes phasing them out in three steps:

1. Increase the separately metered space heating rates by 10% on a revenue neutral basis, prior to any shifts in class responsibility. Also, any approved reduction in revenue responsibility for the Medium General Service Class should not be applied to the separately metered space heating rates.
2. Increase the first block of the all-electric rate's winter energy blocks by 10%.
3. Increase the second block of the all-electric rate's winter energy blocks by 5%.²⁶⁶

Mr. Watkins further proposes to restrict the availability of the all-electric and separately-metered space heating rates to customers currently served on one of those rate schedules, but only for as long as they continuously remain on that rate schedule.

Findings of Fact

According to the stipulation approved in Case No. EO-2005-0329, the rate case in which latan 2 is contemplated to be included in KCPL's cost of service request is due to be filed on October 1, 2009, with new rates to go into effect September 1, 2010.²⁶⁷ KCPL says that the class cost of

²⁶³ Ex. 21, p. 7.

²⁶⁴ Ex. 117, p. 4.

²⁶⁵ Ex. 703, p. 3.

²⁶⁶ Ex. 117, p. 5.

²⁶⁷ See *In re KCPL*, Case No. EO-2005-0329, Report and Order, Attachment 1, Paragraph III.B.3.d .

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service study could be done during that case, but that KCPL would prefer to wait until after that rate case to begin such a study.²⁶⁸ Such a rate design case would have no operation-of-law date (as opposed to a rate case such as this), so the "spin-off" rate design case could conclude quickly, or could take years.²⁶⁹

Regardless of what the stipulation in EO-2005-0329 does, or does not, say, the Commission was not a party to it, and is not bound by it. What is more, Trigen also did not sign that stipulation. Waiting until anywhere from 2009 to 2012 to address the rate disparities that the separately-metered space heating and all-electric tariff customers pay compared to the general service tariff customers is waiting too long.

The Commission will again choose Staff's moderate approach; Staff's support for some of Trigen's proposals seems somewhat tepid, as Staff wonders if any of the classes other than Medium General Service even *has* a rate design problem.²⁷⁰ Trigen's and Staff's argument that increasing all classes' rates the same percentage would effectively increase the size of the general service space-heating rate discounts, and exacerbate the current problem, is compelling.²⁷¹ But the Commission is unwilling to speed ahead with Trigen's proposal, as it would also reduce rates even more for Small and Large General Service customers who, as Staff witness Watkins said, may not even have a rate design problem at all.

Trigen touts parity among the classes' rate of return as a reason for the Commission to choose its proposal. But parity and just and reasonable rates may not necessarily be the same. As the Commission discussed earlier, different customer classes have different levels in risk, with a large industrial or commercial customer being a riskier customer to serve than a residential customer because, for example, the industrial or commercial customer could close down, go bankrupt, thus depriving KCPL of revenue until rates are reset.²⁷² What is more, because Trigen is a competitor of KCPL,²⁷³ a customer could also leave KCPL's system and go to Trigen's system.

²⁶⁸ Tr. Vol. 13, pp. 1061, 1064.

²⁶⁹ *Id.* at pp. 1064-67.

²⁷⁰ Tr. Vol. 13, p. 976.

²⁷¹ Trigen witness Herz refers to the discounted all electric general service tariff rates and the separately metered space-heating rate discounts are sometimes collectively referred to herein as 'space-heating rate discounts', "discounted rates related to space-heating", or simply "discounted rates". See Ex. 702, p. 1, fn. 2. See Ex. 118, p. 8.

²⁷² Tr. Vol. 11, p. 781.

²⁷³ Ex. 701, p. 3.

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As will be discussed later, a wiser approach is to adopt Staff's approach, and require KCPL to submit a class cost of service study in the next rate case. Then the parties and the Commission will have a better understanding of how, if at all, the Commission should re-allocate revenue responsibility among KCPL's customer classes.

Conclusions of Law

There are no additional conclusions of law for this issue.

Decision

KCPL's general service all-electric tariff rates and separately metered space heating rates should be increased more (i.e., by a greater percentage) than KCPL's corresponding standard general application rates by rates by 10% on a revenue neutral basis, prior to any shifts in class responsibility. Also, any approved reduction in revenue responsibility for the Medium General Service Class should not be applied to the separately metered space heating rates. KCPL's first block of the all-electric rate's winter energy blocks should be increased by 10%. KCPL's second block of the all-electric rate's winter energy blocks should be increased by 5%.

13b. Should KCPL's general service all-electric tariffs and separately metered space heating rates be phased-out, and if so, over what period?

Discussion

The arguments and record citations from Trigen, Staff, and KCPL are virtually identical to their arguments and cites from the immediately preceding sub-issue. As such, the Commission will rule on this sub-issue as it did the one just decided, and will rule in Staff's favor.

Findings of Fact

For the reasons cited in the immediately preceding sub-issue, the Commission finds that the evidence supports Staff's position, and adopts the position of Staff in this sub-issue in favor of Staff.²⁷⁴

Conclusions of Law

There are no additional conclusions of law for this issue.

Decision

KCPL's general service all-electric tariffs and separately metered space heating rates should be increased more (i.e., by a greater percentage) than KCPL's corresponding standard general application rates

²⁷⁴ The sub-issue is: Should KCPL's general service all-electric tariff rates and separately metered space heating rates be increased more (i.e., by a greater percentage) than KCPL's corresponding standard general application rates and if so, by how much more? See, *infra*, pp. 70-74.

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by rates by 10% on a revenue neutral basis, prior to any shifts in class responsibility. Also, any approved reduction in revenue responsibility for the Medium General Service Class should not be applied to the separately metered space heating rates. KCPL's first block of the all-electric rate's winter energy blocks should be increased by 10%. KCPL's second block of the all-electric rate's winter energy blocks should be increased by 5%.

13c. *Should the availability of KCPL's general service all-electric tariffs and separately-metered space heating rates be restricted to those qualifying customers' commercial and industrial physical locations being served under such all-electric tariffs or separately-metered space heating rates as of the date used for the billing determinants used in this case (or as an alternative, the operation of law date of this case) and should such rates only be available to such customers for so long as they continuously remain on that rate schedule (i.e., the all-electric or separately-metered space heating rate schedule they are on as of such date)?*

Discussion

KCPL reminds the Commission that this issue was addressed in the 2006 Rate Case, and the Commission ruled against Trigen. One of the most significant effects of Trigen's proposal is the likely increase in rates for all other customers that would result if Trigen's position is adopted. By limiting, restricting, or curtailing the applications of electric heating, customers will likely turn to natural gas or steam heating. This will result in a reduction of electricity usage in off-peak periods and ultimately increased rates to cover the fixed investments previously being recovered by those customers.²⁷⁵

Trigen wants the Commission to restrict the availability of these discounted rates to those qualifying commercial and industrial customers' physical locations being served under such discounted rates currently, i.e., receiving the discounted rates in the test year billing determinants.²⁷⁶ Only in this manner can the restriction be made meaningful.²⁷⁷ Staff agrees with Trigen, and states that these discounted rates should only be available to those qualifying commercial and industrial customers' physical locations

²⁷⁵ Ex. 21, p. 7.

²⁷⁶ Ex. 701, p. 18. As an alternative, the Commission could use the operation of law date for this case; however, Trigen believes that the date used for billing determinants should be used. (Ex. 701, Herz Direct, p. 18).

²⁷⁷ *Id.* at p. 10, fn. 5.

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currently being served under such discounted rates for so long as they continuously remain on that schedule.²⁷⁸

Findings of Fact

The Commission finds that the competent and substantial evidence supports the positions of Staff and Trigen, and finds the issue in favor of Staff and Trigen. The Commission is persuaded by Trigen's argument that last year's Report and Order that limited these discounts to existing customers could exacerbate, rather than ameliorate, the actual or potential problems the discounts cause by allowing even more KCPL customers to migrate to those discounts. In a future rate case, the Commission might be willing to consider eliminating the discounts altogether. Allowing even more customers to use those discounts flies in the face of a possible move, supported by Staff,²⁷⁹ towards eliminating them completely.

Conclusions of Law

There are no additional conclusions of law for this issue.

Decision

The availability of KCPL's general service all-electric tariffs and separately-metered space heating rates should be restricted to those qualifying customers' commercial and industrial physical locations being served under such all-electric tariffs or separately metered space heating rates as of the date used for the billing determinants used in this case, and such rates should only be available to such customers for so long as they continuously remain on that rate schedule (i.e., the all-electric or separately metered space heating rate schedule they are on as of such date).

13d.

i. Should the Commission require KCPL, as soon as possible but not later than its next rate case, to present complete cost of service and/or cost-effectiveness studies and analyses of KCPL's general service all-electric tariffs and separately-metered space heating rates and, consistent with the findings of such studies and analyses, allow KCPL the opportunity at that time to present its preferred phase-out plan for the remaining commercial and industrial customers served under the all-electric tariffs and separately metered space heating rates?

Discussion

KCPL continues the mantra that anything other than an equal percentage increase to each customer class violates the Stipulation from

²⁷⁸ Ex. 117, p. 4.

²⁷⁹ Ex. 117, pp. 4-5.

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Case No. EO-2005-0329. Also, it avers that the time to conduct the cost studies is at the conclusion of the last rate case anticipated by the Regulatory Plan, when Iatan 2 comes on-line.

Trigen asserts that the class cost of service study in KCPL's last rate case lumped all of the standard tariff customers, all-electric tariff customers, and separately metered space-heating commercial and industrial customers together into one of the three general service categories (small, medium and large).²⁸⁰

Staff agrees, asserting that KCPL should have the chance to justify its discounts. If KCPL cannot justify them, then KCPL should have the chance to propose a way to end them.²⁸¹

Findings of Fact

As the Commission stated previously, it disagrees with KCPL's analysis of the meaning of the Stipulation in Case No. EO-2005-0329. The Commission has already stated that it finds, at a minimum, believes that waiting three to five years to get newer, fresher data from the parties, so that the Commission can begin at least considering narrowing the differences in the rates of return the different customer classes pay, is too long to wait.

In the last rate case, KCPL did not investigate or calculate the cost of serving the discounted rate customers, nor did it investigate or calculate the cost-effectiveness of the space-heating rate discounts; instead, it only looked at the general service standard tariff customers and the discounted rate customers as a whole.²⁸² In fact, the same is true for KCPL's prior class cost of service study in 1996. The standard tariff versus discounted rates are the result of maintaining the price differentials which were in effect prior to KCPL's 1996 class cost of service case.²⁸³

When KCPL files the cost of service and/or cost effectiveness studies, KCPL could propose an alternative phase-out plan for the remaining commercial and industrial customers served under the all-electric tariffs and separately metered space heating rates for consideration by the Commission.

Conclusions of Law

There are no additional conclusions of law for this issue.

²⁸⁰ Ex. 701, p. 11.

²⁸¹ Ex. 117, pp. 4-5.

²⁸² Id.

²⁸³ Id.

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Decision

The Commission will require KCPL, not later than its next rate case, to present complete cost of service and/or cost-effectiveness studies and analyses of KCPL's general service all-electric tariffs and separately metered space heating rates and, consistent with the findings of such studies and analyses, allow KCPL the opportunity at that time to present its preferred phase-out plan for the remaining commercial and industrial customers served under the all-electric tariffs and separately metered space heating rates.

ii. In the event that KCPL does not file such cost of service and/or cost-effectiveness studies before or as part of its next rate case, should the Commission require KCPL to impute the revenues associated with the discounted rates in the all-electric general service tariffs and separately-metered space heating provisions of its tariffs and impute revenues equal to KCPL's cost of administering these discounted rates as part of its next rate case?

Discussion

KCPL states that it would be improper and unlawful for the Commission to require the Company to impute a higher rate for these services than the rate that has been lawfully approved by the Commission. Trigen states that the Commission should impute those revenues to give KCPL incentive to file the studies, and avoid further subsidies. Staff states revenues should not be imputed.

Findings of Fact

Because the Commission ruled in Trigen's favor in the immediately preceding sub-issue, there appears to be nothing in this sub-issue for the Commission to resolve.²⁸⁴ But, to the extent a ruling is required, for the reasons listed in sub-issue 13d.i., the Commission finds that it should not impute revenues because the Commission is ordering KCPL to file a class cost of service study in the next rate case.

Conclusions of Law

There are no additional conclusions of law for this issue.

Decision

Because the Commission ruled in Trigen's favor in the immediately preceding sub-issue, there appears to be nothing in this sub-issue for the

²⁸⁴ Of course, should KCPL fail to file the class cost of service study as ordered in this Report and Order, the Commission would consider any parties' motion, either in the next rate case or in a separate case, for sanctions against KCPL for failing to follow a Commission order, and would likewise give KCPL a chance to respond to those motions.

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Commission to resolve. But, to the extent a ruling is required, in the event that KCPL does not file such cost of service and/or cost-effectiveness studies before or as part of its next rate case, the Commission will not require KCPL to impute the revenues associated with the discounted rates in the all-electric general service tariffs and separately metered space heating provisions of its tariffs and impute revenues equal to KCPL's cost of administering these discounted rates as part of its next rate case.

13e *Should the Commission require KCPL to (a) investigate and determine whether the commercial and industrial customers currently served under the general service all-electric tariffs and the separately-metered space heating provisions of the standard general service tariffs continue to meet the eligibility requirements for those discounted rates; (b) remove from the discounted rates those customers which KCPL's investigation determines are no longer eligible for such discounted rates; and (c) monitor and police the eligibility requirements of those customers receiving such discounted rates for reporting in KCPL's direct testimony in its next rate case filing?*

Discussion

KCPL argues that such "eligibility investigations" are currently addressed through the internal processes of the Company for placing customers on the appropriate rates. KCPL believes that it has adopted the appropriate procedures and safeguards for correctly placing customers on the appropriate rates. No such further study is warranted.²⁸⁵ Staff largely agrees, remarking on how time-consuming and awkward such a venture would be, and reminding the Commission the exercise would have little value, since those rates are likely going to be phased out, anyway.²⁸⁶

Trigen avers that KCPL's response to this issue is that it has the appropriate procedures and safeguards for *placing* customers on the appropriate rates.²⁸⁷ But, Trigen argues that KCPL's response misses the point, because this issue deals with customers who are already being served under the discounted rates, and whether they continue to remain eligible for such rates – not with *placing* customers on appropriate rates initially. There is no indication – no record evidence – that KCPL has developed and implemented a process by which it would *remove* a

²⁸⁵ Ex. 20, pp.12-13.

²⁸⁶ Ex. 117, p. 6.

²⁸⁷ Ex. 20, p. 13.

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customer from a discounted rate if the customer no longer meets the eligibility requirements.²⁸⁸

Findings of Fact

The Commission is already ordering KCPL to file a class cost of service study in the next rate case. The results of that study will aid the parties and the Commission in determining what steps, if any, might be needed to perhaps end the general service all-electric and the separately metered space heating discounts in the standard general service tariffs. Such a study is already a substantial burden; requiring KCPL and its customers to constantly to constantly monitor and report via an administrative process that involves gathering behind-the-meter information is too large a burden for the company and the customers.

Conclusions of Law

There are no additional conclusions of law for this issue.

Decision

The Commission will not require KCPL to (a) investigate and determine whether the commercial and industrial customers currently served under the general service all-electric tariffs and the separately metered space heating provisions of the standard general service tariffs continue to meet the eligibility requirements for those discounted rates; (b) remove from the discounted rates those customers which KCPL's investigation determines are no longer eligible for such discounted rates; and (c) monitor and police the eligibility requirements of those customers receiving such discounted rates for reporting in KCPL's direct testimony in its next rate case filing.

13f. Should the Commission approve KCPL's proposal to rename its general service "All-Electric" tariffs as "Space Heating" tariffs?

Discussion

KCPL simply argues such a name change would be appropriate.

Trigen argues that the Commission should not approve KCPL's proposal.²⁸⁹ Trigen submits that renaming these all-electric tariffs as space-heating tariffs would be misleading *and* would not be consistent with the "Availability" section of the tariffs.²⁹⁰ Furthermore, KCPL failed to provide any evidence why the tariffs should be renamed; therefore, KCPL's unsupported proposal cannot be adopted.

²⁸⁸ Ex. 703, p. 10.

²⁸⁹ Ex. 702, p. 6.

²⁹⁰ *Id.*

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Staff agrees, stating that KCPL inadvertently filed proposed all electric tariff sheets on which the title had been changed from "All Electric" to "Space Heating." This change should not appear or be approved when KCPL files its compliance tariffs.²⁹¹

Findings of Fact

KCPL pointed to no evidence to support its position. Therefore, the Commission will rule against KCPL.

Conclusions of Law

There are no additional conclusions of law for this issue.

Decision

The Commission should not approve KCPL's proposal to rename its general service "All-Electric" tariffs as "Space Heating" tariffs.

IT IS ORDERED THAT:

1. The motions for leave to file briefs out of time filed by the Staff of the Commission and the Office of the Public Counsel are granted.
2. The Motion to Strike filed by the Office of the Public Counsel, and the Motion to Strike Portions of Prefiled Surrebuttal Testimony of Staff Witness Janice Pyatte filed by Kansas City Power & Light Company are granted, and the portion of Ms. Pyatte's testimony to which the Office of the Public Counsel and Kansas City Power & Light Company object; namely, from page 9, line 19, to page 11, line 16 of Exhibit 111, shall be stricken from the record.
3. All pending motions and requests for relief not otherwise granted herein are denied.
4. The proposed tariff sheets filed by Kansas City Power & Light Company on February 1, 2007, Tariff No. YE-2007-0541, are rejected.
5. Kansas City Power & Light Company shall file tariffs that comport with this Report and Order no later than December 13, 2007.
6. The Staff of the Commission shall file a recommendation regarding the tariffs ordered in paragraph 5 no later than December 18, 2007. Any party that wishes to object to the tariffs ordered in paragraph 5 shall do so no later than December 18, 2007.

²⁹¹ Ex. 117, p. 8.

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7. This Report and Order shall become effective on December 16, 2007.

Davis, Chm., Murray, and Jarrett, CC., concur;
Clayton, C., dissents, with separate dissenting
opinion to follow;
and certify compliance with the provisions
of Section 536.080, RSMo.
Appling, C., not participating.

Dated at Jefferson City, Missouri,
on this 6th day of December, 2007.

Note: A Clarification to this order is available in the official case files of the Public Service Commission.

Note: See page 635 for another order in this case.

Note: At time of publication, no dissent has been issued.

**In the Matter of an Investigation into an Incident in December 2005 at
the Taum Sauk Pumped Storage Project Owned and Operated by the
Union Electric Company, doing business as AmerenUE**

Case No. ES-2007-0474

Decided: December 6, 2007

Electric §32. The Commission has received an Incident Report filed by Staff on October 24, 2007 as a result of the Commission opening a case to investigate the Taum Sauk Reservoir collapse on the night of December 14-15, 2005. The report includes several recommendations for process improvements at AmerenUE.

ORDER RECEIVING STAFF REPORT

On the night of December 14-15, 2005, the Upper Reservoir Dam at the Taum Sauk Pumped Storage Project, which was an electric energy generation facility owned and operated by Union Electric Company d/b/a AmerenUE, collapsed causing injury to persons and damage to property. In light of the Commission's responsibility for ensuring safe delivery of electricity service in Missouri, the Commission opened this case to investigate the incident on June 19, 2007. Rather than opening a contested

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case, as Public Service Commission Staff requested, the Commission found it reasonable to open the investigation solely for the purpose of receiving an Incident Report. The Order also states, "[i]f the result of the investigation is sufficient to warrant any action against AmerenUE or its officers or agents, then such action shall be requested in a different docket." The Commission held a hearing beginning on July 24, 2007 and Staff filed the Incident Report on October 24, 2007.

In that Incident Report, Staff made the following recommendations for process improvements at AmerenUE:

1. That any and all costs, direct and indirect, associated with the Taum Sauk incident be excluded from rates on an ongoing basis. This includes, but is not limited to, the exclusion of rebuilding costs and treating the facility as though its capacity is available for dispatch modeling.

2. That appropriate accounting treatment be given to the monies expended to rebuild the Taum Sauk plant in order to protect the interests of Missouri ratepayers.

3. That UE shall submit to Staff, on an ongoing basis, its accounting treatment for all transactions relating to the reconstruction of the Taum Sauk plant.

4. That a single, on-site, supervising engineer shall be assigned to oversee all engineering projects at a given UE facility. This supervising engineer shall be responsible and accountable for the satisfactory completion of the work, shall have all necessary authority, including authority to determine when, and whether, the unit may be released for operation, and shall report to an officer of UE.

5. That UE's officers, executives and managers shall work only for UE and shall not simultaneously work for affiliates of UE or for UE's parent.

6. That only UE's officers, executives and managers shall be authorized to make decisions affecting UE's facilities and services.

7. That these internal controls shall be reflected in UE's policies, procedures and job descriptions.

8. That UE shall implement a "whistleblower" program whereby employees may report safety concerns directly to UE's officers without exposure to retaliation. Any such reports shall be immediately communicated to Staff.

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9. That UE shall designate an officer or executive as its system-wide safety officer. This officer shall have appropriate duties and authority in order to act effectively to protect UE's assets and system, its employees and customers, as well as the general public, private and public property, from undue risk.

10. That UE shall produce and file, within 90 days hereof, its plan for implementing these recommendations.

On November 7, 2007, AmerenUE filed its response to the Staff Incident Report in which it noted that it had already taken the following steps to address the issues that contributed to the Taum Sauk failure:

a. Established a dam safety group that has the responsibility for, among other things, design review, procedure development, training, and facility inspections. It also has the authority to shut a facility down if it believes the facility is being operated unsafely.

b. Developed and implemented a quality management system, which provides training on design basis and takes into account procedure development. This system applies to all of AmerenUE's fossil and hydro units.

c. Changed and updated its operating procedures, and issued directives that reiterate that AmerenUE's philosophy is that employees should take a conservative approach and always favor making the safe decision.

d. Put in place procedures and review systems to ensure that if the Taum Sauk facility is rebuilt it is done safely and pursuant to industry standards.

e. Cooperated fully in all investigations into the Taum Sauk breach event, and taken responsibility for the effects of the breach.

f. Reached settlement with the family injured during the failure in less than 90 days after the event.

g. Spent more than \$48 million to date for restoration of Johnson's Shut-Ins State Park and the Black River.

h. Paid a \$10 million fine to the FERC and set aside an additional \$5 million for projects to enhance the area around Taum Sauk.

i. Voluntarily removed the effects of the Taum Sauk breach, the lack of generation from Taum Sauk, and the costs associated with the Taum Sauk investigations, clean-up, and settlements from its most recent rate case (Case No. ER-2007-0002), long before

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this proceeding was instituted, so that they do not impact customers.

j. Performed a risk analysis of all of AmerenUE's generating plants to identify potential risks. [transcript citations omitted]

In the same Response, AmerenUE addressed each of the Staff's recommendations, as follows:

[1.] AmerenUE has already committed to protecting its customers from bearing the costs of the Taum Sauk failure. To that end, in its most recent rate case, AmerenUE excluded from its revenue requirement the costs of investigating the failure, the costs the Company incurred for the clean-up at Taum Sauk, the costs of compensating parties adversely affected by the failure (including, for example, compensation paid to the family that was injured during the failure and the \$48 million paid—so far—to restore Johnson's Shut-Ins State Park), and the cost of the fine paid to the FERC related to the failure. In addition, in setting rates the Company modeled its system as though the Taum Sauk plant continued to operate in order to give customers the full benefit of the plant and the economic power it could generate during peak periods.

* * *

[2.] AmerenUE agrees that it will give appropriate accounting treatment to such monies.

* * *

[3.] AmerenUE agrees with this recommendation, but believes that "on an ongoing basis" is vague. The Company agrees to submit its accounting treatment to the Staff on a semi-annual basis.

* * *

[4.] AmerenUE generally agrees with this recommendation with two caveats. First, the recommendation should be limited to AmerenUE's generating plants. Second, the supervising engineers should report to an AmerenUE manager, but should have the obligation to report any unresolved safety issues to the AmerenUE safety officer responsible for the facility.

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* * *

[5.] AmerenUE does not agree with this recommendation. Although on January 1, 2007 AmerenUE was reorganized so that it has a Chief Executive Officer (Tom Voss) who has ultimate authority over AmerenUE matters, and the AmerenUE operations officers who report to Mr. Voss work exclusively for AmerenUE, the Company has other officers who simultaneously work for other affiliates and are responsible for nonoperating functions. AmerenUE does not believe that this structure results in less focus or attention on AmerenUE operations, or that it had anything to do with the causes of the Taum Sauk failure. In addition, implementation of this recommendation would unnecessarily limit AmerenUE's ability to efficiently manage its business. Because the Company sees no basis for or potential benefit from implementing this recommendation, it does not agree with it.

* * *

[6.] AmerenUE generally agrees that AmerenUE officers should be responsible for decisions affecting the Company. However, AmerenUE operates as part of a holding company structure, and many services are provided to AmerenUE by service company employees at cost. For example, Ameren Services Company provides accounting, human resources, and legal services to AmerenUE at cost. Similarly, Ameren Energy Fuels and Services Company provides fuel acquisition services to AmerenUE at cost. Employees of these and other affiliate companies necessarily make day-to-day decisions affecting the Company's facilities and services, and use of these service companies is the most efficient and effective way to meet the Company's needs. AmerenUE is currently structured such that its officers, executives and managers are ultimately responsible for decisions affecting the Company's facilities and services. However, it would be costly and unjustified to require that they make every decision that could possibly affect the Company's operations.

* * *

[7.] AmerenUE agrees that any recommendations that it has agreed to will be reflected in relevant policies, procedures and job descriptions.

* * *

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[8.] AmerenUE agrees to implement this recommendation, and agrees to provide the Staff with a semi-annual report detailing these reports rather than reporting them “immediately” before any investigation can be undertaken.

* * *

[9.] AmerenUE agrees with this recommendation, but believes three separate safety officers need to be designated—one officer for the Callaway nuclear plant, one officer for the other generating plants, and one officer for the transmission and distribution systems. The different nature of these facilities requires a different safety officer for each.

* * *

[10.] AmerenUE agrees to file such a plan for implementation of the recommendations it has agreed to, as outlined above.

The Commission declines to adopt the recommended findings of fact and conclusions of law set forth in Staff’s Incident Report, as that was not the purpose of this docket. The Commission notes the reasonableness of most of Staff’s recommendations and notes that AmerenUE has voluntarily agreed to implement almost all of them.

Having served its purposes of providing a means for the Staff to conduct an investigation and submit an incident report, and for AmerenUE to provide such information as the Commission required and respond to the incident report, this docket may be closed.

IT IS ORDERED THAT:

1. The Staff’s Initial Incident Report is received.
2. This order shall become effective upon issuance.
3. This matter is closed.

Davis, Chm., Murray, Clayton,
Appling, and Jarrett, CC., concur.

Dale, Chief Regulatory Law Judge

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**OPINION OF COMMISSIONER ROBERT M. CLAYTON III,
CONCURRING IN PART AND DISSENTING IN PART**

This Commissioner files this opinion to applaud the work of staff in completing a detailed and comprehensive report on AmerenUE's actions and omissions in the Taum Sauk disaster. The staff report recounts and explores the mistakes that led to a disaster that could have become a tragedy. This docket was created as an "uncontested case" to collect and compile information related to the incident of December 14-15, 2005. Because "uncontested cases" do not afford the standard rights of substantive and procedural due process, this case cannot be used to further substantive changes on any party. This Commissioner must concur in the majority's Order to receive the investigative staff report.

However, this Commissioner must dissent because further action is necessary to effectuate the recommendations made by the staff of the Missouri Public Service Commission (staff) in the case. This Commissioner believes that those recommendations, in which the Public Counsel concurs, warrant further consideration and possible implementation, even if over the objections of AmerenUE. Without an additional Order demanding compliance with those recommendations, the Commission is ignoring the severity of the disaster by simply trusting AmerenUE to follow recommendations outlined by the staff. Although this Commissioner offered an amendment to address this critical issue and empower staff, the majority rejected the proposal leaving much work left undone.

In general, Commission investigations are tracked with a case number and usually conclude with a staff report and list of recommendations. If the company is agreeable with the recommendations, then the Commission orders that the utility comply with the recommendations in an Order. If the utility disagrees with the recommendations, then either the case proceeds to hearing to offer all of the parties the opportunity to present additional evidence and cross-examine witnesses or a new case is opened to address the dispute. In addition, if the staff finds evidence of a rule or statute violation, then the investigation may be closed and a new case opened with a Complaint. The Commission concludes its involvement with any such investigation by either an Order implementing recommendations, rejecting staff's proposals or possibly levying penalties against a utility.

During the Agenda meeting of December 6, 2007, the public meeting at which this Order was presented, this Commissioner offered

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an amendment that would have directed the staff to take the necessary steps to begin the process of implementing their recommendations. However, the Commission declined that amendment and merely accepted the report without taking any additional action on the recommendations. The Order does not mandate AmerenUE's compliance nor does it direct enforcement through another case. This Commissioner's proposed amendment, which was defeated during the Commission meeting, reads as follows, "Staff is directed to take the steps necessary to open a new case for the purpose of implementing Staff's recommendations contained in its October 24, 2007, Incident Report."

This Commissioner believes additional steps should be taken for the Commission to consider staffs recommendations. While this Commissioner is not prejudging the merits of each of the recommendations, those proposals are designed to protect rate payers from the mistakes made by the utility and to prevent similar future occurrences. Positive change can only occur with an Order of the Commission derived from a contested case with full due process protections for all of the parties. It appears that the majority is comfortable relying on staff to monitor further activity associated with its recommendations, but, without a Commission Order directing AmerenUE to implement some or all of staff's recommendations, there is no process for enforcing compliance and no potential penalty for failure to comply. In addition, the staff must be given the authority to act through a complaint if it feels it is necessary. This Commissioner believes an Order setting out clear policy and the decision of the Commission, is the best way to proceed.

The staff is to be commended for compiling a detailed and thoughtful report fully describing the events that occurred before, during and after the disaster at Taum Sauk. This report deserves to be received and made available to the public for further review. Legally, no additional action may be taken in this case because of its investigative and uncontested design and this docket has no real use beyond acceptance and release of the report. It is in a new case where this Commission can take up and address the substantive recommendations made by the staff. This Commissioner's defeated amendment would have authorized that additional action.

For the foregoing reasons, this Commissioner concurs in part and dissents in part.

The Staff of the Missouri Public Service Commission v. Universal Utilities, Inc., and Nancy Carol Croasdell

*Case No. WC-2008-0079
Decided: December 13, 2007*

Water§1. The Commission struck the answer of Universal Utilities, Inc., and Nancy Croasdell for failure to comply with the Commission's order granting staff's motion to compel discovery and entered default judgment.

**ORDER STRIKING ANSWER AND ENTERING DEFAULT JUDGMENT
AS SANCTION FOR REFUSAL TO COMPLY WITH DISCOVERY
ORDER**

On November 14, 2007, the Staff of the Commission filed a motion asking the Commission to issue a judgment in default against the Respondents, Universal Utilities, Inc., and Nancy Carol Croasdell. The basis of Staff's motion is the Respondents' refusal to respond to certain data requests propounded by Staff, even after the Commission granted Staff's motion to compel those responses. The Respondents have not responded to Staff's motion for default judgment.

The Commission's rule on sanction for failure to comply with discovery orders is found at 4 CSR 240-2.090(1). That rule states "[s]anctions for abuse of the discovery process or failure to comply with commission orders regarding discovery shall be the same as those provided for in the rules of civil procedure." The applicable civil procedure rule is Rule 61.01(b)(1). That rule indicates that for a party's failure to answer interrogatories, an appropriate sanction is "[a]n order striking pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or render a judgment by default against the disobedient party." A judgment by default is a drastic punishment for failure to comply with a discovery order, but the courts have said "it is properly invoked where a party has shown a contumacious and deliberate disregard for the authority of the court."¹

In this case, Staff served 28 data requests on the Respondents on September 26, 2007. Counsel for the Respondents objected to those data requests on October 9. However, the Respondents' sweeping objections to Staff's data requests were merely a listing of nearly every conceivable

¹ *Karolat v. Karolat*, 151 S.W.3d 852, 857 (Mo. App. W.D. 2004).

objection that could be made to a discovery request. The Respondents made no attempt to relate any of their general objections to any of the individual data requests made by Staff.

On October 19, Staff filed a motion asking the Commission to compel the Respondents to answer the data requests. The Respondents did not respond to that motion. On November 1, the Commission granted Staff's motion to compel and ordered the Respondents to answer Staff's data requests no later than November 8. The Respondents ignored the Commission's order and did not answer Staff's data requests. Staff's motion for a default judgment followed on November 14.

Through their refusal to comply with the Commission's discovery order and their refusal to even respond to Staff's motion for default judgment, the Respondents have displayed an utter disdain for the authority of the Commission. Still, the entry of a default judgment for a refusal to answer data requests is a severe sanction. In another type of case, the Commission might be inclined to impose a lesser sanction to try to force the Respondents to comply. However, in the circumstances of this case, default judgment is appropriate.

Staff's complaint alleges that the Respondents are operating water and sewer systems in one or more locations in Missouri without having obtained the statutorily required certificate of convenience and necessity from this Commission. Staff seeks authority to proceed to circuit court to seek the imposition of civil penalties against the Respondents for that violation of Missouri statute.

In a 1981 case, the Missouri Court of Appeals, Southern District, held that the Commission has exclusive jurisdiction to first determine, after a proper hearing, that a party is unlawfully operating a public utility. The Commission must make that determination before it can seek penalties in circuit court for that unlawful operation.² For that reason, Staff had to file this complaint with the Commission before it could proceed to circuit court to enforce the law by seeking penalties against the Respondents.

However, in 1993, the general assembly passed a statute that says, "[a]n administrative order authorizing the commencement of any such suit [for civil penalties] shall not be considered as evidence of the violations alleged in any such suit."³ In other words, no holding the Commission can make in this case can be given any preclusive effect in a subsequent action in circuit court. If General Counsel seeks penalties in circuit court, it must

² *State v. Carroll*, 620 S.W.2d 22 (Mo. App. S.D. 1981)

³ Section 516.103, RSMo 2000.

prove its case before the circuit court as if this complaint before the Commission never happened.⁴

In questioning whether an adversarial hearing was still required before a state agency could seek penalties in circuit court, the Missouri Court of Appeals recognized that “[e]nactment of §516.103 apparently renders the [administrative] hearing merely a moot court for the proceeding to follow in circuit court.”⁵ However, that question was not before the court in that case and the court made no decision on whether a contested hearing before the Commission is required.

Therefore, as required by previous court decision, the Commission offered the Respondents an opportunity to contest Staff’s allegations before possibly having to again contest those allegations before the circuit court. Perhaps aware that this case before the Commission is just a “moot court” before the binding action that could follow in circuit court, the Respondents have chosen to ignore the authority of the Commission.

Respondents are free to choose to defend themselves for the first time in circuit court, but there is no reason to delay resolution of this case by trying to force them to comply with discovery before this Commission. By their refusal to comply with the Commission’s discovery order, the Respondents have shown a “contumacious and deliberate disregard for the authority of the court.” As a sanction for their refusal to comply with the Commission’s discovery order, the Commission will strike the Respondents’ answers and will enter a default judgment against them.

Missouri courts have held that a default judgment imposed as a sanction under the rules of discovery is not a true default judgment. Rather “the remedy is imposed on the presumption that no merit exists in asserted defenses or claims in light of the failure to produce information. Thus, the judgment does not come by default in the ordinary sense and is treated as a judgment upon trial by the court.”⁶ As a result, the usual procedures governing motions to set aside the default do not apply.⁷ For this case before the Commission, that means Commission Rule 4 CSR 240-2.070(9) allowing seven days to file a motion to set aside a default in a complaint case does not apply. If the Respondents wish to dispute this order, they will need to file an application for rehearing before the effective date of the order. The Commission finds that the allegations in Staff’s First Amended

⁴ See. *State ex rel. Mo. Div. of Transp. v. Sure-Way Transp., Inc.*, 884 S.W.2d 349 (Mo. App. W.D. 1994).

⁵ *Id.* at 353, FN 5.

⁶ *State ex rel Eddy v. Rolf*, 145 S.W.3d 429, 433 (Mo. App. W.D. 2004).

⁷ *Id.*

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Complaint are established. Specifically, the Commission finds that Respondent Universal Utilities, Inc., and Respondent Nancy Carol Croasdell are water corporations, sewer corporations, and public utilities, as those terms are defined by Missouri statute, at each and every location they operate in Missouri. The Commission further finds that Respondent Universal Utilities, Inc., and Respondent Nancy Carol Croasdell have violated Section 393.170 RSMo by providing water and sewer services without Commission authority since January 31, 2003, and that each and every days' violation of law is a separate and continuing offense. Finally, the Commission finds that Respondent Universal Utilities, Inc., and Respondent Nancy Carol Croasdell are subject to penalties and that the General Counsel is authorized to proceed to circuit court to collect penalties for each and every day's violation of law extending back to January 31, 2003.

IT IS ORDERED THAT:

1. Staff's Motion for Default Judgment is granted.
2. The Answer of Universal Utilities, Inc., and Nancy Carol Croasdell to Staff's First Amended Complaint is struck as a sanction for failure to comply with the Commission's Order Granting Staff's Motion to Compel Discovery.
3. A default judgment is entered against Universal Utilities, Inc., and Nancy Carol Croasdell.
4. The facts alleged in Staff's First Amended Complaint are found to be established.
5. The Commission's General Counsel is authorized to file an action in the circuit court of its choosing to collect penalties against Universal Utilities, Inc., and Nancy Carol Croasdell, as allowed by Sections 386.570 and 386.600, RSMo 2000.
6. This order shall become effective on December 23, 2007.

Davis, Chm., Murray, Clayton, Appling,
and Jarrett, CC., concur.

Woodruff, Deputy Chief Regulatory Law Judge

AQUILA, INC., D/B/A AQUILA NETWORKS-MPS AND
AQUILA NETWORKS-L&P

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**In the Matter of Tariff Revisions filed by Aquila, Inc., d/b/a Aquila
Networks-MPS and Aquila Networks-L&P Designed to Continue And
Expand its Fixed Bill Pilot Program**

*Case No. EO-2007-0395
Decided: December 20, 2007*

Electric§1. The Commission ordered that the proposed tariff sheets that would implement the expansion and extension of Aquila's fixed bill pilot program be rejected. The Commission found that the fixed bill pilot program would not give proper pricing signals to customers and would therefore encourage the wasteful use of electricity.

Appearances

Paul A. Boudreau, Brydon, Swearingen & England, P.C., 312 East Capitol Avenue, P.O. Box 456, Jefferson City, Missouri 65102-0456, and

Renee Parsons, Senior Attorney, Aquila, Inc., 20 West 9th Street, Kansas City, Missouri 64105

Nathan Williams, Deputy General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102

Lewis R. Mills, Jr., Public Counsel, P. O. Box 2230, Jefferson City, Missouri 65102

**REGULATORY LAW JUDGE: Morris L. Woodruff, Deputy Chief
Regulatory Law Judge**

REPORT AND ORDER

Syllabus: The Commission finds Aquila's proposed expansion and extension of its fixed bill pilot program would not give proper pricing signals to customers and would therefore encourage the wasteful use of electricity. This will result in unnecessary increases in Aquila's residential load, causing harm to Aquila's customers as well as to the public. As a result, the proposed program is not just and reasonable and on that basis, the Commission rejects Aquila's tariff that would implement the expansion and extension of its fixed bill pilot program.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure

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to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Procedural History

On April 19, 2007, Aquila, Inc., d/b/a Aquila Networks-MPS and Aquila Networks-L&P filed a tariff that would modify and extend its existing fixed bill pilot program. Aquila's tariff was assigned tariff number JE-2007-0739. Along with its tariff, and motion asking the Commission to approve the tariff, Aquila filed the direct testimony of its employee, Dennis Odell. Aquila's tariff originally carried a July 1 effective date, but Aquila subsequently extended the effective date until September 1. On August 28, acting on motions filed by its Staff and the Office of the Public Counsel, the Commission suspended Aquila's tariffs until December 30, 2007.

The Commission established a procedural schedule that required the parties to prefile direct, rebuttal, and surrebuttal testimony. An evidentiary hearing was held on November 16. The parties filed post-hearing briefs on December 11.

Aquila's Fixed Bill Pilot Program

Aquila's proposed fixed bill pilot program would be a voluntary billing option to allow customers to receive a predetermined fixed monthly bill for electric service over the course of a one-year period. The fixed bill would not change during the year regardless of weather variations, usage by the customer, or changes in utility rates. Unlike other level payment plans, there would be no true-up adjustment at the end of the year.¹

The amount of each customer's fixed bill would be based on that customer's historical, weather-normalized electric usage priced at current tariffed rates. Aquila would then add a program fee, not to exceed twelve percent, to the monthly rate. The program fee would compensate Aquila for shouldering the operational and financial risks of the program.²

Aquila acknowledges that the fixed bill program is not intended to save money for participating customers, and would not be marketed in that way. Rather the program would allow customers to knowingly choose to pay a little extra, on average, for the certainty of knowing they will pay the same electric bill each month for a year, without a true-up payment at the end of the year.³

¹ Odell Direct, Ex. 1, Page 2, Lines 5-10.

² Odell Direct, Ex. 1, Page 5, Lines 11-16.

³ Odell Direct, Ex. 1, Page 4, Lines 6-15.

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The program fee Aquila would add to participating customer's bills would include two components. The first component would be a risk premium to cover the risk of departure from expected values such as weather and pricing changes. The risk premium would also cover Aquila's administrative costs to operate the program.⁴ The second component is a quantity factor, also described as a kilowatt hour growth factor, that would account for any difference in actual electric consumption from predicted consumption. Aquila would include this component in recognition that a customer might consume more power while under the fixed billing alternative because they know their bill will not increase with increased usage.⁵

Aquila represents that the risk premium and the quantity factor would be set at an amount not to exceed six percent each, resulting in a total program fee not to exceed twelve percent.⁶ However, Aquila acknowledges that the actual submitted tariff language would simply cap the total program fee at twelve percent without limiting either component to six percent.⁷ Aquila represents that it is willing to modify the submitted tariff language to cap the separate components at six percent each if the Commission directs it to do so.⁸

Aquila's proposal extends and expands an existing pilot program, which the Commission approved for a two-year period in 2005.⁹ Subsequently, the Commission extended that pilot program for a third year, expiring on May 31, 2008.¹⁰ Participation in the existing pilot program is limited to residential customers in the City of St. Joseph, Missouri.¹¹

The expanded pilot program that Aquila has proposed would extend eligibility to participate in the pilot program to all Missouri residential customers who are otherwise eligible to participate in the program.¹² The expanded pilot program would continue for an additional five years, during which the program would be evaluated annually.¹³ The expanded pilot program would also increase the program fee from eight percent to twelve percent. Additionally, Aquila would add an early termination fee if a

⁴ Odell Direct, Ex. 1, Page 5, Lines 19-22.

⁵ Odell Direct, Ex. 1, Page 6, Lines 1-3.

⁶ Transcript, Page 31, Lines 14-19.

⁷ Transcript, Page 32, Lines 6-16.

⁸ Transcript, Page 87, Lines 8-12.

⁹ Busch Rebuttal, Ex. 3, Page 2, Lines 17-18.

¹⁰ Busch Rebuttal, Ex. 3, Page 3, Lines 2-4.

¹¹ Busch Rebuttal, Ex. 3, Page 3, Lines 13-14.

¹² Odell Direct, Ex. 1, Page 3, Line 21.

¹³ Odell Direct, Ex. 1, Page 5, Lines 3-7.

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customer wanted to withdraw from the program during the year,¹⁴ and would add a clause to remove participants from the program if they abuse the system by increasing their weather-adjusted usage by more than thirty percent.¹⁵

Aquila also proposes the expanded pilot program be accounted for "below-the-line". That would mean the financial risks associated with the expanded pilot program would be borne by Aquila's shareholders, not its ratepayers. If Aquila were to lose money on the pilot program it could not recover those losses from its ratepayers in a future rate case. However, if the expanded pilot program were accounted for "below-the-line", Aquila's shareholders would also be able to keep any profits resulting from the program.

The existing pilot program is accounted for "above-the-line" and has experienced costs that exceed revenues for the first two years of its existence.¹⁶ However, Aquila anticipates the expanded pilot program will be profitable in future years.¹⁷

The existing pilot program has been moderately popular with customers in St. Joseph. Aquila offered the program to 16,000 customers the first year and 541, or 3.38 percent accepted. Aquila offered to renew 507 customers for a second year in the program and 475 customers accepted.¹⁸ In the second year of the pilot program, Aquila sent out new offers to 15,500 customers. Of those customers, 652 chose to participate, for an acceptance rate of 4.2 percent.¹⁹

Objections by Staff and Public Counsel

Staff and Public Counsel oppose Aquila's proposed extension and expansion of its fixed bill pilot program. Both object to various aspects of Aquila's expanded program, including the increased program fees and Aquila's proposal that the expanded program be accounted for "below-the-line". However, Public Counsel particularly objects to the load-building effects that will result from the program. The Commission shares Public Counsel's concern, and on that basis will reject Aquila's proposal. Since the Commission is rejecting the tariff, it does not need to address the other arguments offered by Staff and Public Counsel.

Load-Building Effects of Aquila's Fixed Bill Pilot Program

¹⁴ Odell Direct, Ex. 1, Page 7, Lines 6-16.

¹⁵ Odell Direct, Ex. 1, Page 7, Lines 18-22.

¹⁶ Transcript, Page 24, Lines 1-5.

¹⁷ Transcript, Page 30, Lines 1-6. See also, Ex. 5 and Ex. 6.

¹⁸ Busch Rebuttal, Ex. 3, Page 4, Lines 5-14.

¹⁹ Busch Rebuttal, Ex. 3, Page 4, Lines 20-21.

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Aquila concedes that its expanded fixed bill pilot program will result in increased electric usage by participating customers. That potential for increased customer usage is the reason Aquila included a six percent kilowatt hour growth factor in its proposal.²⁰ Aquila acknowledges the load for participating customer's could increase by six percent each year,²¹ but attempts to minimize the impact of that increase by pointing out that such an increase of usage would result in only a .18 percent increase in its overall system usage.²²

However, if the increased usage resulting from participation in the pilot program were measured against just overall residential usage, it would result in an increase of .386 percent for residential usage in the first year.²³ This is still not a large amount, but that increase would offset over 70 percent of the load decrease Aquila expects to obtain from the Residential Lighting Program the Commission approved in September 2007.²⁴ The load increases for the residential class that would result from the expanded pilot program are particularly a problem for Aquila because its residential load is increasing rapidly and it is already short of the capacity needed to meet that increasing load.

According to the load growth projections in Aquila's most recent Integrated Resource Plan, Aquila's load is expected to grow at an average rate of 2.5 percent over the next 20 years.²⁵ The increased load resulting from the expanded pilot program would increase the load growth rate for the residential class to 2.86 percent.²⁶ Aquila is already short of the capacity needed to meet that growing demand for power.²⁷ For that reason, every increment of additional load growth requires Aquila to obtain additional capacity at additional cost.

The amount of increase in Aquila's load that would result from implementation of the proposed pilot program is not insignificant, but it is not large when compared to the company's overall load. The existing pilot program has shown that some customers are interested enough in the certainty of cost they can obtain by locking in a fixed bill to be willing to pay a premium to receive that service. Based solely on those considerations, the Commission might approve some sort of fixed bill program, although not

²⁰ Transcript, Pages 32-33, Lines 17-25, 1-2.

²¹ Transcript, Page 34, Lines 8-10. See also, Kind Direct, Ex. 4, Attachment 3.

²² Transcript, Page 61, Lines 9-19.

²³ Kind Rebuttal, Ex. 4, Page 8, Lines 16-20.

²⁴ Kind Rebuttal, Ex. 4, Pages 6-7, Lines 17-25, 1-13.

²⁵ Kind Rebuttal, Ex. 4, Page 8, Lines 22-24.

²⁶ Kind Rebuttal, Ex. 4, Page 8, Lines 24-26.

²⁷ Kind Rebuttal, Ex. 4, Page 8, Lines 3-9. See also Kind Rebuttal, Attachment 4.

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necessarily Aquila's specific proposal, simply to satisfy the desires of those customers. However, the Commission must also consider the broader public policy implications of Aquila's fixed bill pilot program.

National public policy regarding energy efficiency requires Aquila and its customers to at least attempt to reduce the growth in use of electric power. Aquila's proposed fixed bill pilot program would instead have the perverse effect of encouraging residential customers to use electricity without regard to the price signal otherwise associated with increased usage. Aquila argues that the price signal to encourage conservation is still present in subsequent years when the price offer made to the customer will increase or decrease depending upon the amount of electricity used. However, Aquila, itself, must believe that such a price signal will not be fully effective since it has designed its program on the assumption that usage of electricity will increase by up to six percent each year under the program.

In its brief, Public Counsel aptly describes Aquila's proposed fixed bill pilot program as an "all you can eat" rate design. Just as a person looking to lose weight is well advised to avoid an "all you can eat" buffet, the public interest in reducing the growth in usage of electricity is best served by avoiding Aquila's "all you can eat" fixed bill pilot program.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law:

1. Aquila, Inc., is an "Electrical Corporation" and "Public Utility", as those terms are defined at Subsections 386.020 (15) and (42), RSMo Supp. 2006. As such, it is subject to regulation by this Commission.

2. Section 393.130.1, RSMo Supp. 2006, requires that all charges made or demanded by an electrical corporation be just and reasonable.

DECISION

Based on the facts as it has found them, and its conclusions of law, the Commission finds that Aquila's proposed expansion and extension of its fixed bill pilot program would not give proper pricing signals to customers and would therefore encourage the wasteful use of electricity. This may result in unnecessary increases in Aquila's residential load, causing harm to Aquila's customers as well as to the public. As a result, the proposed program is not just and reasonable and on that basis, the Commission will reject Aquila's tariff that would implement the expansion and extension of its fixed bill pilot program.

IT IS ORDERED THAT:

KINGDOM TELEPHONE COMPANY

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1. The proposed tariff sheets (JE-2007-0739) submitted on April 19, 2007, by Aquila, Inc., are rejected.
2. This Report and Order shall become effective on December 30, 2007.

Murray, Clayton, Appling, and
Jarrett, CC., concur;
Davis, Chm., dissents, with
separate dissenting opinion to follow;
and certify compliance with the provisions
of Section 536.080, RSMo.

Note: At time of publication, no dissent has been issued.

**In the Matter of the Application of Kingdom Telephone Company for
Authority to Borrow an Amount Not to Exceed \$5,000,000 from
CoBank Under a Twelve (12) Year Secured Credit Facility and in
Connection Therewith to Execute a Lien and Security Interest**

*Case No. IF-2008-0139
Decided: December 20, 2007*

Telecommunications §19. The Commission ordered that the application filed by Kingdom Telephone Company on November 2, 2007 be approved. This application allowed Kingdom Telephone Company to borrow up to \$5 million from the CoBank, ACB and furthermore authorizes Kingdom Telephone Company to execute and deliver promissory notes in order to complete the transactions.

ORDER APPROVING FINANCING APPLICATION

On November 2, 2007, Kingdom Telephone Company, Inc., filed its application seeking authority to borrow certain funds and to pledge substantially all its assets as security for the loan. Kingdom Telephone is a small, rural incumbent local exchange carrier serving seven exchanges in the counties of Audrain, Calloway, and Montgomery. Kingdom Telephone seeks authority to borrow up to \$5,000,000 from CoBank, ACB, in order to fund capital improvements and to finance its operating needs.

On November 7, 2007, the Commission issued an order directing its Staff to file a recommendation regarding the application. Other parties

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wishing to respond to the application were also given the opportunity to do so. Staff filed its recommendation and memorandum on December 5, 2007. No other responses have been received.

Kingdom Telephone proposes to borrow an amount, not to exceed \$5 million, from CoBank, ACB. CoBank is part of the Farm Credit System, which is a nationwide financial cooperative that lends money and provides financial services to agriculture and rural America. Staff states that over the past five years, Kingdom Telephone has invested money in operating plant with internally generated funds. Earlier this year, the Company paid off the remaining balance of its prior financing, so the financing proposed in this application will reimburse moneys previously expended on plant and also provide funding for various capital improvement projects. Staff has reviewed the proposed financing with Kingdom Telephone and believes that the use of the funds is reasonable. Based upon its review, Staff recommends that the Commission approve the application as not detrimental to the public interest in this case, subject to the following conditions:

- That nothing in the Commission's order shall be considered a finding by the Commission of the value of this transaction for rate making purposes, and that the Commission reserves the right to consider the ratemaking treatment to be afforded this financing transaction and its impact on cost of capital, in any later proceeding.
- That Kingdom Telephone shall file with the Commission any information concerning deviations from all final terms and conditions on this financing in its application including, but not limited to, the aggregate principal amount to be sold or borrowed, price information, estimated expenses, and portion subject to the fee schedule and loan or indenture agreement concerning each issuance.
- That Kingdom Telephone shall file with the Commission any information concerning deviations from the use of the funds stated in its application that would materially change the pro forma capitalization and financial ratios submitted with its application.
- That within 30 days after execution of draw-down, Kingdom Telephone shall file a report with the Commission's Budget and Fiscal Services Department reflecting the

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amount of the draw-down and use of the proceeds so that the fee schedule may be applied.

That the Commission find that the money, property and labor to be procured by this transaction is reasonably required for the purposes specified above, and that no part of the proceeds shall be reasonably chargeable to operating expenses or to income.

That the Commission grant such further relief in this matter as it may deem necessary.

Kingdom Telephone did not file a response to Staff's recommendation. Although the Office of the Public Counsel is a party to this case, it did not file a recommendation or a response to Staff's recommendation.

The Commission has reviewed and considered Kingdom Telephone's application and the recommendation of its Staff, and concludes that the proposed transaction in an amount up to \$5 million is not detrimental to the public interest and shall be approved. The Commission will require Kingdom Telephone to comply with the conditions recommended by Staff as ordered below.

IT IS ORDERED THAT:

1. The application filed by Kingdom Telephone Company on November 2, 2007, is approved with the conditions set out below.
2. Kingdom Telephone Company is authorized to borrow up to \$5 million from the CoBank, ACB.
3. Kingdom Telephone Company is authorized to execute and deliver promissory notes in order to complete the transactions.
4. Kingdom Telephone Company is authorized to do any and all other things incidental, necessary or appropriate to the performance of any and all acts specifically authorized in this order, including executing all documents necessary for the financing authorized in this proceeding.
5. The money, property and labor to be procured by the authorized transactions are reasonably required for the purposes specified above, and no part of the proceeds shall be reasonably chargeable to operating expenses or to income.
6. Within 30 days of the execution of a draw-down, Kingdom Telephone Company shall file a report with the Commission's Budget and Fiscal Services Department reflecting the amount of the draw-down and the use of proceeds so that the fee schedule may be applied.
7. Nothing in this order shall be considered a finding by the Commission of the value of these transactions for ratemaking purposes.

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8. The Commission reserves the right to consider the ratemaking treatment to be afforded these transactions and the resulting cost of capital in a later proceeding.

9. This order shall become effective on December 30, 2007.

10. This case may be closed on December 31, 2007.

Davis, Chm., Clayton, Appling,
and Jarrett, CC., concur.
Murray, C., dissents.

Dippell, Deputy Chief Regulatory Law Judge

**In the Matter of the Application of Kansas City Power & Light
Company for Approval to Make Certain Changes in Its Charges for
Electric Service to Implement Its Regulatory Plan**

Case No. ER-2007-0291

Decided: December 21, 2007

Electric §20. The Commission approved Staff's recommended language clarifying Kansas City Power & Light's proposed rates.

**ORDER REGARDING MOTIONS FOR
REHEARING AND REQUEST FOR CLARIFICATION**

On February 1, 2007, Kansas City Power & Light Company submitted to the Commission proposed tariff sheets intended to implement a general rate increase for electrical service provided in its Missouri service area. The Commission issued a Report and Order on December 6, 2007. The Commission received a Request for Clarification from Staff, and motions for rehearing from KCPL and OPC.

Staff requests the Commission to clarify whether it intended the availability of KCPL's general service All-Electric and separately-metered space heating rates to be restricted to those qualifying customers' commercial and industrial physical locations being served under such rates as of September 30, 2007, January 1, 2008, or some other date. The Commission intended to adopt Trigen's alternative, and to limit those discounted rates to customers being served under such rates as of January 1, 2008. This will allow KCPL to keep the almost 200 customers

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who signed up for the discounted rates in 2007 on those discounted rates, while ending those discounts as of an alternative date suggested by Trigen.¹

Staff further requests that the Commission clarify an apparent inconsistency between its order that KCPL's general service all-electric tariffs and separately metered space heating rates should be increased more (i.e., by a greater percentage) than KCPL's corresponding standard general application rates by 10% on a revenue neutral basis, prior to any shifts in class responsibility, and its order that KCPL's first block of the all-electric rate's winter energy blocks should be increased by 10%, and KCPL's second block of the all-electric rate's winter energy blocks should be increased by 5%. Staff states that both KCPL and Trigen agree with Staff's proposed language to clarify the Report and Order.

The language Staff proposes is "KCPL's separately metered space heating rates should be increased by more (i.e., by a greater percentage) than KCPL's corresponding standard general application rates by 10% on a revenue neutral basis, prior to any shifts in class responsibility. KCPL's first block of the All-Electric rate's winter energy blocks should be increased by 10%, on a revenue neutral basis, prior to any shifts in class responsibility. KCPL's second block of the All-Electric rate's winter energy block should be increased by 5%, on a revenue neutral basis, prior to any shifts in class responsibility. Any approved reduction in the revenue responsibility for the Medium General Service Class should not be applied to the separately metered space heating rate or to the All-Electric rate's winter energy blocks." The Commission intended such a result, and will adopt Staff's suggested language.

KCPL requests rehearing on these issues as well, claiming that Trigen did not put on competent and substantial evidence to support such a sudden shift away from KCPL's decade old rate design. As a matter of fact, because the Commission is ordering KCPL to file a class cost of service study in its next rate case, the Commission should at least wait until that study is filed to make such a decision. Finally, KCPL asks for rehearing or, in the alternative, a stay or variance from its decision on restricting the availability of all-electric and separately-metered space heating discounts.

KCPL's motion is largely based upon the perspective of its customers in the midst of millions of dollars worth of infrastructure development, and how they will be deprived of these discounts if the

¹ See Kansas City Power & Light Company's Application for Rehearing and Stay, Or In the Alternative, Application for Waiver or Variance From Decision for Specific Customers, pp. 6-7 (December 14, 2007).

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Commission does not modify its decision. But there is no protected property interest in any particular utility rate.² Indeed, the Commission put KCPL on notice of a possible change to these discounted rates last year when it stated that "it is concerned that during KCPL's winter season, commercial and industrial customers under the all-electric general service tariffs pay about 23% less for the entire electricity usage than they would otherwise pay under the standard general service tariff, and that commercial and industrial customers under the separately metered space-heating provisions . . . pay about 54% less for such usage than they would pay under the standard general service tariff".³ KCPL's motion is denied.

On December 20, Staff responded to KCPL's request for rehearing. Staff asked that the Commission reopen the record to take evidence on the issues KCPL raised concerning a substantial number of customers who have relied upon KCPL's discounted all-electric and separately-metered space heating rates to make investments in construction and heating equipment. The Commission will deny Staff's request, and notes that the request states that it is "unfortunate" that KCPL "chose not to provide the information (about these customers who have made substantial investments, or are considering such investments, in reliance upon KCPL's discounted rates) in any of the testimony that it filed on this issue in last (sic) case or this case, but instead waited until after the Commission made its decision to not accept KCPL's position on this issue in the instant case."⁴

OPC asks for rehearing on capital structure, off-system sales, and a revenue neutral shift from the Medium General Service class to the residential class. The Commission will address those topics separately.

OPC accuses the Commission of acting on a "whim" by using KCPL's parent companies' *actual capital structure* instead of imputing a *hypothetical* capital structure to KCPL as it imputed to St. Joseph Light & Power in 1993.⁵ In the SJLP case, the Commission's Staff also advocated for a hypothetical capital structure.⁶ But in KCPL, Staff argues for an actual capital structure, claiming that it is Staff's practice to use actual figures,

² See *State ex. rel Jackson County v. Public Service Commission*, 532 S.W.2d 20, 31 (Mo. banc 1975).

³ *In re KCPL*, Commission Case No. ER-2006-0314, Report and Order, p. 83 (December 21, 2006).

⁴ See *In re KCPL*, Staff's Response to the Application for Rehearing Filed by Kansas City Power & Light Company and Responses Thereto of Trigen, Commission Case No. ER-2007-0291, p. 5 (filed December 20, 2007).

⁵ See *In Re St. Joseph Light & Power*, Commission Case Nos. ER-93-41, EC-93-252, 2 Mo. P.S.C 3d 248 (1993).

⁶ *Id.* at p. 250.

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which are known and measurable, and therefore fair, to all parties.⁷ In fact, in SJLP, Staff's alternative position was that the Commission should use SJLP's actual capital structure, which included 59.10% common equity, which is even more equity than the actual capital structure of KCPL in this case.⁸

Moreover, in the SJLP case, both Staff and OPC used a "proxy group" similar to the proxy groups used in the KCPL case to arrive at an estimate of a proper capital structure.⁹ Indeed, OPC used a "zone of reasonableness" test to get its hypothetical capital structure.¹⁰ But in KCPL, OPC instead eschewed such an analysis in favor of merely urging the Commission to use the benchmarks "published by credit rating agencies which provide guidelines for utilities as to how much debt and equity they can use to finance utility operations and still maintain an investment grade credit quality."¹¹ This analysis is unpersuasive, especially when OPC also argues on one hand that the Commission should rely on credit rating agencies, such as Standard & Poor's, to impute a mythical capital structure to a utility but then, on the other hand, argues that following that same credit rating agency's method of calculating additional amortizations is tantamount to the Commission handing its ratemaking authority to S&P.¹²

For off-system sales, the Commission, in its Report and Order, has already cited evidence that KCPL is not even close to meeting the 25th percentile of projected off-system sales for 2007. In addition, the Commission has ordered KCPL to file monthly surveillance reports of its off-system sales with Staff. If Staff or OPC believes those reports indicate that KCPL is intentionally manipulating its off-system sales in derogation of this Report and Order, the Experimental Regulatory Plan, or any other statute, rule or tariff, those parties are not only free, but encouraged, to seek what they believe the appropriate remedies are.

And for the revenue shift away from Medium General Service customers to residential customers, OPC criticizes the Commission for speculating that latan 2 might be placed into service, yet accuses the Commission of ignoring the impact of the cessation of amortizations at the time latan 2 goes into service. Further, OPC talks of the amount of

⁷ See *In re KCPL*, Staff's Post-Hearing Reply and True-Up Brief, Commission Case No. ER-2007-0291, p. 17 (filed November 16, 2007).

⁸ See *In re St. Joseph Light and Power*, 2 Mo.P.S.C. 3d at 250.

⁹ *Id.* at 250-251.

¹⁰ *Id.* at 251.

¹¹ Ex. 210, p. 3.

¹² Ex. 212, p. 1-4.

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to offer two further points in support of the Commission's decision in this matter.

First, with respect to the hypothetical capital structure argued for by OPC in this matter, I follow the exact same reasoning used by OPC and other parties successfully in the 2004 MGE rate case, Case No. GR-2004-0209. On page 1 of its reply brief filed on August 17, 2004, OPC noted the consolidated capital structure was the most appropriate to use in that case because it is the capital structure that is recognized in the investment community and the company conducts business, finances its operations and raises capital based on that capital structure. In further support of its position, OPC cites the case of City of Lynchburg et. Al v. Chesapeake and Potomac Telephone Company of Virginia, 107 S .E .2d 462, 472 (Va . 1959):

It is only when it is made clear by the evidence that the officers and directors are following a policy in this regard which unreasonably favors the stockholders at the expense of the consumers that the rate-making tribunal should substitute a capital structure radically different from one fashioned by the officers and directors of the corporation.

There is no evidence in this case that the directors and officers were attempting to "unreasonably favor stockholders at the expense of consumers." OPC does point out that KCP&L could have issued approximately \$100 million worth of debt instead of hybrid equity; however, given the circumstances that KCP&L is trying to obtain the cash flow necessary to maintain its credit rating during a construction phase and issuing new stock to finance that construction is part of the plan, KCP&L's conduct is reasonable under the circumstances.

Finally, and most important, decisions by other regulatory bodies don't necessarily constitute competent and substantial evidence on which this Commission should base its decision; however, the decision of the Kansas Corporation Commission in a companion KCP&L rate case is instructive. In that case, all of the parties in that case either agreed or did not object to a settlement providing KCP&L with a \$28 million rate increase. The Kansas Corporations Commission, a majority of whom are democrats, approved that settlement and it is important to note that KCP&L's Missouri territory is larger in terms of both customers and load. Their decision only provides further evidence that the Commission acted appropriately in this case and the efforts of people who say otherwise are misplaced.

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amortizations and KCPL filing its next rate case as anticipated.¹³ In any event, those amortizations will not offset the rate increase needed when or, indeed, if, Iatan 2 comes on line.

Further, as OPC stated, "because equity's more expensive and less risky (than debt), if the percentage of equity goes up, the cost of equity should be going down."¹⁴ This is largely true, and one of many reasons the Commission declined to award KCPL its' requested 11.25% return on equity. The cost of equity is, indeed, going down, as the 10.75% return on equity the Commission awarded KCPL is over \$6 million less in traditional earnings than KCPL requested.

IT IS ORDERED THAT:

1. The Request for Clarification filed by the Staff of the Commission is granted as described above.
2. The motions for rehearing filed by Kansas City Power & Light Company and the Office of the Public Counsel are denied.
3. All other pending requests for relief not expressly granted are denied.
4. This order shall become effective on December 21, 2007.

Davis, Chm., concurs, with separate concurring opinion to follow.

Murray and Jarrett, CC., concur.

Clayton, dissents.

Appling, C., not participating.

Pridgin, Senior Regulatory Law Judge

NOTE: See page 552 for another order in this case.

**CONCURRING OPINION OF CHAIRMAN JEFF DAVIS WITH REGARD
TO MOTIONS FOR REHEARING AND REQUEST FOR
CLARIFICATION**

This commissioner concurs with all respects of the order and in the interest of achieving certain finality in this matter files this brief concurrence

¹³ See *In re* KCPL, Commission Case No. ER-2007-0291, the Office of The Public Counsel's Application for Rehearing, pp. 4-5 (December 14, 2007).

¹⁴ Tr. Vol. 15, p. 1142.

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**In the Matter of the Review of the Competitive Classification of the
Exchanges of Embarq Missouri, Inc., d/b/a Embarq**

*Case No. IO-2008-0092
Decided: December 27, 2007*

Telecommunications §40. The Commission found that competition continues to exist in exchanges belonging to Embarq of Missouri, Inc., d/b/a Embarq that the Commission had previously classified as competitive. Furthermore, the Stipulation and Agreement filed by Embarq of Missouri, Inc., d/b/a Embarq; the Staff of the Commission; and the Office of the Public Counsel is approved.

**ORDER APPROVING STIPULATION AND AGREEMENT AND FINDING
CONTINUED COMPETITION IN CERTAIN EXCHANGES OF EMBARQ**

On September 28, 2007, the Staff of the Missouri Public Service Commission filed a report pursuant to Section 392.245.5, RSMo (Supp. 2006), regarding continued competitive classification for Embarq Missouri, Inc., d/b/a Embarq's competitively classified exchanges. Staff concluded that competition continues to exist in Embarq's competitively classified exchanges and recommended that the Commission make a finding of that fact. The Commission established October 22 as the deadline for the filing of applications to intervene. No such applications were filed.

Acting on a request for hearing made by the Office of the Public Counsel, the Commission scheduled a prehearing conference for December 10. At that conference, the presiding officer ordered the parties to file a proposed procedural schedule by December 17. The Commission subsequently extended that deadline to December 21.

On December 20, Embarq, Staff, and Public Counsel filed a unanimous stipulation and agreement. In that stipulation, all parties agree that the Commission may consider the previously filed verified Staff report as evidence to determine whether competitive conditions continue to exist in the Embarq exchanges previously granted competitive classification. Staff and Embarq further stipulate that Staff's report demonstrates the continued existence of competitive conditions in those exchanges and that such exchanges should remain classified as competitive. Public Counsel did not join that part of the stipulation, but stipulated that it does not object to Staff and Embarq's stipulation and will not offer any evidence in opposition to that stipulation. As part of the stipulation, Public Counsel withdrew its request for a hearing.

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Section 392.245.5(6), RSMo (Supp. 2006) requires the Commission to review the status of competition in exchanges previously designated as competitive. That review is to be conducted at least every two years. The statutorily established standard for determining whether competition continues to exist in those Embarq exchanges previously designated as competitive is very straightforward. Competition is defined to exist in those exchanges if at least two nonaffiliated entities in addition to the incumbent local exchange company are providing basic local telecommunications service to customers. Staff's verified report, which the parties stipulate may be considered as evidence, indicates the statutory standard continues to be met in Embarq's competitively classified exchanges.

On the basis of Staff's verified report and the stipulation and agreement of Staff and Embarq, to which no party objects, the Commission finds that competition as defined by Section 392.245.5 RSMo (Supp. 2006) continues to exist in those exchanges of Embarq that the Commission previously classified as competitive.

IT IS ORDERED THAT:

1. The Stipulation and Agreement filed by Embarq of Missouri, Inc., d/b/a Embarq; the Staff of the Commission; and the Office of the Public Counsel is approved.
2. The Commission finds that competition, as defined by Section 392.245.5, RSMo (Supp. 2006), continues to exist in those exchanges of Embarq of Missouri, Inc., d/b/a Embarq that the Commission previously classified as competitive.
3. This order shall become effective on January 6, 2008.

Davis, Chm., Murray, Clayton, Appling,
and Jarrett, CC., concur.

Woodruff, Deputy Chief Regulatory Law Judge

DIGEST OF REPORTS
OF THE
PUBLIC SERVICE COMMISSION
OF THE
STATE OF MISSOURI

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ACCOUNTING

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II. DUTY TO KEEP PROPER ACCOUNTS

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The Commission allowed Staff to make an adverse evidentiary inference when the utility, through gross incompetence, failed to retain and produce for review either a paper or electronic copy of customer invoices. – Staff v. Missouri Pipeline Company, LLC and Missouri Gas Company, LLC 16 MPSC 3d 459.

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- §2. Obligation of the utility
- §3. Certificate of convenience and necessity
- §4. Transfer, lease and sale
- §4.1. Change of suppliers
- §5. Charters and franchise
- §6. Territorial agreements

II. JURISDICTION AND POWERS

- §7. Jurisdiction and powers generally
- §8. Jurisdiction and powers of Federal Commissions
- §9. Jurisdiction and powers of the State Commission
- §10. Jurisdiction and powers of the local authorities
- §11. Territorial agreements
- §12. Unregulated service agreements

III. OPERATIONS

- §13. Operations generally
- §14. Rules and regulations
- §15. Cooperatives
- §16. Public corporations
- §17. Abandonment and discontinuance
- §18. Depreciation
- §19. Discrimination
- §20. Rates
- §21. Refunds
- §22. Revenue
- §23. Return
- §24. Services generally
- §25. Competition
- §26. Valuation
- §27. Accounting
- §28. Apportionment
- §29. Rate of return
- §30. Construction
- §31. Equipment
- §32. Safety
- §33. Maintenance
- §34. Additions and betterments

ELECTRIC

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- §35. Extensions
- §36. Local service
- §37. Liability for damage
- §38. Financing practices
- §39. Costs and expenses
- §40. Reports, records and statements
- §41. Billing practices
- §42. Planning and management
- §43. Accounting Authority orders
- §44. Safety
- §45. Decommissioning costs

IV. RELATIONS BETWEEN CONNECTING COMPANIES

- §46. Relations between connecting companies generally
- §47. Physical connection
- §48. Contracts
- §48.1 Qualifying facilities
- §49. Records and statements

ELECTRIC

I. IN GENERAL

§1. Generally

The Commission ordered that the proposed tariff sheets submitted by Aquila, Inc., d/b/a Aquila Networks – MPS and Aquila Networks – L&P, submitted on May 25, 2007, be rejected. The basis for rejection was noncompliance with Commission Rule 4 CSR 240-20.090(6) which requires the effective period for any fuel adjustment clause to be no more than four years. In specific the rejected sheets are Sheet No. 124, 125, 126, and 127. – Aquila, Inc. 16 MPSC 3d 2.

The Commission's Report and Order was clarified to provide that AmerenUE shall pay interest to ratepayers at its short-term borrowing rate for annual accrued SO₂ sales above a base level of \$5 million and shall collect carrying costs from ratepayers at the same rate if sales fall below that base level. – Union Electric Company d/b/a AmerenUE 16 MPSC 3d 99.

The Commission granted a certificate of public convenience and necessity to, own, operate, and maintain a 161 kV transmission line in only the portion of Clark County, Missouri, described in its application. – The Empire District Electric Company 16 MPSC 3d 352.

ELECTRIC

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The Commission ordered that the Order Granting Expedited Treatment and Approving Tariffs issued on December 29, 2006, be vacated and that the proposed electric service tariff sheets submitted by Empire District Electric Company on December 28, 2006 be approved for service on and after December 14, 2007. – The Empire District Electric Company 16 MPSC 3d 543.

The Commission ordered that the proposed tariff sheets that would implement the expansion and extension of Aquila's fixed bill pilot program be rejected. The Commission found that the fixed bill pilot program would not give proper pricing signals to customers and would therefore encourage the wasteful use of electricity. – Aquila, Inc. 16 MPSC 3d 626.

§3. Certificate of convenience and necessity

The Commission ordered that Aquila, Inc.'s Application be dismissed due in fact to the Commission having previously granted Aquila all the authority it needs to construct a substation in Benton County branching from a Certificate of Convenience and Necessity granted in a Report and Order, issued on January 18, 1938 (Case No. 9470). – Aquila, Inc. 16 MPSC 3d 292.

The Commission granted a certificate of public convenience and necessity to, own, operate, and maintain a 161 kV transmission line in only the portion of Clark County, Missouri, described in its application. – Interstate Power and Light Company 16 MPSC 3d 354.

III. OPERATIONS

§14. Rules and regulations

The Commission did not adopt the Net Metering Standard because the prior state action applied given that the Commission already adopted comparable rules. – Energy Policy Act of 2005 16 MPSC 3d 169.

§20. Rates

The Commission found an appropriate return on equity and other typical factors in determining Kansas City Power & Light's revenue requirement. – Kansas City Power & Light Company 16 MPSC 3d 552.

The Commission approved Staff's recommended language clarifying Kansas City Power & Light's proposed rates. – Kansas City Power & Light Company 16 MPSC 3d 635.

§32. Safety

The Commission has received an Incident Report filed by Staff on October 24, 2007 as a result of the Commission opening a case to investigate the Taum Sauk Reservoir collapse on the night of December 14-15, 2005. The report includes several recommendations for process improvements at AmerenUE. – Union Electric Company 16 MPSC 3d 614.

EVIDENCE, PRACTICE AND PROCEDURE

I. IN GENERAL

- §1. Generally
- §2. Jurisdiction and powers
- §3. Judicial notice; matters outside the record
- §4. Presumption and burden of proof
- §5. Admissibility
- §6. Weight, effect and sufficiency
- §7. Competency
- §8. Stipulation

II. PARTICULAR KINDS OF EVIDENCE

- §9. Particular kinds of evidence generally
- §10. Admissions
- §11. Best and secondary evidence
- §12. Depositions
- §13. Documentary evidence
- §14. Evidence by Commission witnesses
- §15. Opinions and conclusions; evidence by experts
- §16. Petitions, questionnaires and resolutions
- §17. Photographs
- §18. Record and evidence in other proceedings
- §19. Records and books of utilities
- §20. Reports by utilities
- §21. Views

III. PRACTICE AND PROCEDURE

- §22. Parties
 - §23. Notice and hearing
 - §24. Procedures, evidence and proof
 - §25. Pleadings and exhibits
 - §26. Burden of proof
 - §27. Finality and conclusiveness
 - §28. Arbitration
 - §29. Discovery
 - §30. Settlement procedures
 - §31. Mediator
 - §32. Confidential evidence
 - §33. Defaults
-

EVIDENCE, PRACTICE AND PROCEDURE

I. IN GENERAL §1. Generally

The Commission did not adopt the Fuel Sources Standard because the prior state action applied given that the Commission already adopted comparable rules. – Energy Policy Act of 2005 16 MPSC 3d 157.

§2. Jurisdiction and powers

The Commission has no jurisdiction to promulgate an order requiring a pecuniary reparation or refund. – Staff v. Missouri Pipeline Company, LLC and Missouri Gas Company, LLC 16 MPSC 3d 459.

§4. Presumption and burden of proof

The Commission utilized the *prudence standard* which, recognizes that a utility's cost are presumed to be prudently incurred, and that a utility need not demonstrate in its case-in-chief that all expenditures are prudent. The Commission further recognized that the *prudence standard* is not based on hindsight, but upon a reasonableness standard. – Missouri Gas Energy 16 MPSC 3d 245.

II. PARTICULAR KINDS OF EVIDENCE

§19. Records and books of utilities

The Commission allowed Staff to make an adverse evidentiary inference when the utility, through gross incompetence, failed to retain and produce for review either a paper or electronic copy of customer invoices. - Staff v. Missouri Pipeline Company, LLC and Missouri Gas Company, LLC 16 MPSC 3d 459.

III. PRACTICE AND PROCEDURE

§23. Notice and hearing

If a respondent fails to timely respond to a complaint, the Commission may deem the complaint admitted, and may enter an order granting default. – Rogue Creek Utilities, Inc. 16 MPSC 3d 121.

§30. Settlement procedures

The Commission struck Respondent's motion that asked the Commission to approve a nonunanimous stipulation and agreement that had not been signed by any other party, finding that the motion disclosed settlement negotiations in an improper attempt to negotiate a settlement directly with the Commission. – Staff v. Suburban Water and Sewer Company 16 MPSC 3d 358.

The Commission concluded that the Respondent was not denied its right to an impartial decision maker when the Commission chose to hear additional oral arguments from the parties after those parties submitted post-hearing briefs. – Staff v. Missouri Pipeline Company, LLC and Missouri Gas Company, LLC 16 MPSC 3d 383.

EXPENSE

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The Commission granted an application for rehearing and modified its interpretation of a utility's tariff provision based solely on its reading of the language of the tariff. – Staff v. Missouri Pipeline Company, LLC and Missouri Gas Company, LLC 16 MPSC 3d 383.

EXPENSE

I. IN GENERAL

- §1. Generally**
- §2. Obligation of the utility**
- §3. Financing practices**
- §4. Apportionment**
- §5. Valuation**
- §6. Accounting**

II. JURISDICTION AND POWERS

- §7. Jurisdiction and powers of the State Commission**
- §8. Jurisdiction and powers of the Federal Commissions**
- §9. Jurisdiction and powers of local authorities**

III. EXPENSES OF PARTICULAR UTILITIES

- §10. Electric and power**
- §11. Gas**
- §12. Heating**
- §13. Telecommunications**
- §14. Water**
- §15. Sewer**

IV. ASCERTAINMENT OF EXPENSES

- §16. Ascertainment of expenses generally**
- §17. Extraordinary and unusual expenses**
- §18. Comparisons in absence of evidence**
- §19. Future expenses**
- §20. Methods of estimating**
- §21. Intercompany costs or dealings**

V. REASONABLENESS OF EXPENSE

EXPENSE

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- §22. Reasonableness generally
- §23. Comparisons to test reasonableness
- §24. Test year and true up

VI. PARTICULAR KIND OF EXPENSE

- §25. Particular kinds of expenses generally
- §26. Accidents and damages
- §27. Additions and betterments
- §28. Advertising, promotion and publicity
- §29. Appraisal expense
- §30. Auditing and bookkeeping
- §31. Burglary loss
- §32. Casualty losses and expenses
- §33. Capital amortization
- §34. Collection fees
- §35. Construction
- §36. Consolidation expense
- §37. Depreciation
- §38. Deficits under rate schedules
- §39. Donations
- §40. Dues
- §41. Employee's pension and welfare
- §42. Expenses relating to property not owned
- §43. Expenses and losses of subsidiaries or other departments
- §44. Expenses of non-utility business
- §45. Expenses relating to unused property
- §46. Expenses of rate proceedings
- §47. Extensions
- §48. Financing costs and interest
- §49. Franchise and license expense
- §50. Insurance and surety premiums
- §51. Legal expense
- §52. Loss from unprofitable business
- §53. Losses in distribution
- §54. Maintenance and depreciation; repairs and replacements
- §55. Management, administration and financing fees
- §56. Materials and supplies
- §57. Purchases under contract
- §58. Office expense
- §59. Officers' expenses
- §60. Political and lobbying expenditures
- §61. Payments to affiliated interests
- §62. Rentals
- §63. Research
- §64. Salaries and wages

GAS

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- §65. Savings in operation**
- §66. Securities redemption or amortization**
- §67. Taxes**
- §68. Uncollectible accounts**
- §69. Administrative expense**
- §70. Engineering and superintendence expense**
- §71. Interest expense**
- §72. Preliminary and organization expense**
- §73. Expenses incurred in acquisition of property**
- §74. Demand charges**
- §75. Expenses incidental to refunds for overcharges**
- §76. Matching revenue/expense/rate base**
- §77. Adjustments to test year levels**
- §78. Isolated adjustments**

EXPENSE

No headnotes in this volume involved the question of expense.

GAS

I. IN GENERAL

- §1. Generally**
- §2. Obligation of the utility**
- §3. Certificate of convenience and necessity**
- §4. Abandonment or discontinuance**
- §5. Liability for damages**
- §6. Transfer, lease and sale**

II. JURISDICTION AND POWERS

- §7. Jurisdiction and powers of the State Commission**
- §8. Jurisdiction and powers of the Federal Commissions**
- §9. Jurisdiction and powers of local authorities**

III. CONSTRUCTION AND EQUIPMENT

- §10. Construction and equipment generally**
- §11. Leakage, shrinkage and waste**
- §12. Location**
- §13. Additions and betterments**
- §14. Extensions**

- §15. Maintenance
- §16. Safety

IV. OPERATION

- §17. Operation generally
- §17.1. Purchased Gas Adjustment (PGA)
- §17.2. Purchased Gas-incentive mechanism
- §18. Rates
- §19. Revenue
- §20. Return
- §21. Service
- §22. Weatherization
- §23. Valuation
- §24. Accounting
- §25. Apportionment
- §26. Restriction of service
- §27. Depreciation
- §28. Discrimination
- §29. Costs and expenses
- §30. Reports, records and statements
- §31. Interstate operation
- §32. Financing practices
- §33. Billing practices
- §34. Accounting Authority orders
- §35. Safety

V. JOINT OPERATIONS

- §36. Joint operations generally
- §37. Division of revenue
- §38. Division of expenses
- §39. Contracts
- §40. Transportation
- §41. Pipelines

VI. PARTICULAR KIND OF EXPENSES

- §42. Particular kinds of expenses generally
- §43. Accidents and damages
- §44. Additions and betterments
- §45. Advertising, promotion and publicity
- §46. Appraisal expense
- §47. Auditing and bookkeeping
- §48. Burglary loss
- §49. Casualty losses and expenses

§50.	Capital amortization
§51.	Collection fees
§52.	Construction
§53.	Consolidation expense
§54.	Depreciation
§55.	Deficits under rate schedules
§56.	Donations
§57.	Dues
§58.	Employee's pension and welfare
§59.	Expenses relating to property not owned
§60.	Expenses and losses of subsidiaries or other departments
§61.	Expenses of non-utility business
§62.	Expenses relating to unused property
§63.	Expenses of rate proceedings
§64.	Extensions
§65.	Financing costs and interest
§66.	Franchise and license expense
§67.	Insurance and surety premiums
§68.	Legal expense
§69.	Loss from unprofitable business
§70.	Losses in distribution
§71.	Maintenance and depreciation; repairs and replacements
§72.	Management, administration and financing fees
§73.	Materials and supplies
§74.	Purchases under contract
§75.	Office expense
§76.	Officers' expenses
§77.	Political and lobbying expenditures
§78.	Payments to affiliated interests
§79.	Rentals
§80.	Research
§81.	Salaries and wages
§82.	Savings in operation
§83.	Securities redemption or amortization
§84.	Taxes
§85.	Uncollectible accounts
§86.	Administrative expense
§87.	Engineering and superintendence expense
§88.	Interest expense
§89.	Preliminary and organization expense
§90.	Expenses incurred in acquisition of property
§91.	Demand charges
§92.	Expenses incidental to refunds for overcharges

I. IN GENERAL**§ 3. Certificate of convenience and necessity**

The Commission granted Southern Missouri Gas Company, L.P., d/b/a Southern Missouri Natural Gas, a certificate of convenience and necessity for a natural gas distribution system to provide gas service in Houston, Licking, and Lebanon, Missouri, as long as the shareholders, not the ratepayers, bear the risk of any loss caused by the failure to meet the conversion projections. – Southern Missouri Natural Gas 16 MPSC 3d 269.

III. CONSTRUCTION AND EQUIPMENT**§16. Safety**

The Commission upon its review of a filed complaint by USW Local 11-6, which alleged Laclede had failed to provide safe adequate service relating to the installation of Automatic Meter Reading Devices on its meters, concluded that the service provided by Laclede relating to the installation of AMR devices on its meters was safe and adequate. Therefore, USW Local 11-6's First Amended Complaint was denied on its merits and dismissed. – USW Local 11-6 v. Laclede Gas Company 16 MPSC 3d 83.

The Commission adopted the Joint Recommendation Concerning Pipeline Replacement Schedule. This Recommendation states that the City Utilities will continue to conduct an annual leakage survey over "pre-1983 psig plastic piping" and will continue to conduct quarterly leak surveys of the downtown business district. – City Utilities of Springfield 16 MPSC 3d 507.

IV. OPERATION**§17. Operation generally**

The Commission rejected Staff's proposed disallowance for MGE failing to properly analyze its pipeline needs because Staff failed to overcome the presumption of prudence by demonstrating a serious doubt about the prudence of MGE's decisions. – Missouri Gas Energy 16 MPSC 370.

§18. Rates

The Commission ordered that the proposed gas tariff sheets submitted on December 1, 2006, by Laclede Gas Company for the purpose of increasing rates for gas service to retail customers be rejected. – Laclede Gas Company 16 MPSC 3d 186.

The Commission did not need to consider ratemaking factors when acting to enforce an existing tariff rather than exercising its ratemaking authority. – Staff v. Missouri Pipeline Company, LLC and Missouri Gas Company, LLC 16 MPSC 3d 459.

§28. Discrimination

The respondent intrastate pipeline companies violated their tariffs and the Commission's affiliate transaction rule by allowing their gas marketing affiliate access to what should have been confidential information about operations on

the pipeline. – Staff v. Missouri Pipeline Company, LLC and Missouri Gas Company, LLC 16 MPSC 3d 459.

The respondent intrastate pipeline companies provided discounted services to an affiliated gas marketing company and by the terms of their tariffs, were required to offer the same discounted rates to nonaffiliated gas marketing companies. – Staff v. Missouri Pipeline Company, LLC and Missouri Gas Company, LLC 16 MPSC 3d 459.

§35. Safety

The Commission allowed Laclede to reduce the number of replacements to the buried soft copper service lines. Meanwhile the Commission ordered Staff to report annually and if the public safety is compromised, to present that information immediately. – Laclede Gas Company 16 MPSC 3d 365.

V. JOINT OPERATIONS

§36. Joint operations generally

The Commission found that Staff had proved the allegations contained in Count III of its complaint, in which Missouri Pipeline Company and Missouri Gas Company offered certain transportation discounts to Omega, at a time when Omega was an affiliated company. As a result of this finding the Commission has ordered that by the terms of their tariffs, the rates MPC and MGC charged to an affiliated shipper became the maximum rate that could be charged to a non-affiliated shipper on June 21, 2006. – Staff v. Missouri Pipeline Co., LLC and Missouri Gas Co., LLC 16 MPSC 3d 295.

§41. Pipelines

The respondent intrastate pipeline companies violated their tariffs and the Commission's affiliate transaction rule by allowing their gas marketing affiliate access to what should have been confidential information about operations on the pipeline. – Staff v. Missouri Pipeline Company, LLC and Missouri Gas Company, LLC 16 MPSC 3d 459.

The respondent intrastate pipeline companies' tariffs do not require every transportation customer who receives natural gas delivered through the pipeline to have executed a transportation agreement. – Staff v. Missouri Pipeline Company, LLC and Missouri Gas Company, LLC 16 MPSC 3d 459.

The respondent intrastate pipeline companies provided discounted services to an affiliated gas marketing company and by the terms of their tariffs, were required to offer the same discounted rates to nonaffiliated gas marketing companies. – Staff v. Missouri Pipeline Company, LLC and Missouri Gas Company, LLC 16 MPSC 3d 459.

The respondent intrastate pipeline companies violated their tariffs by failing to report offers of discounted transportation service to the Commission's Staff. – Staff v. Missouri Pipeline Company, LLC and Missouri Gas Company, LLC 16 MPSC 3d 459.

VI. PARTICULAR KIND OF EXPENSES

§42. Particular kinds of expenses generally

Staff's proposal to disallow \$2,055,864 in costs for first-of-month demand charges for swing supply natural gas incurred by Laclede Gas Company in its 2003-2004 ACA period was rejected after Laclede successfully proved the questioned expenditures to have been prudent. – Laclede Gas Company 16 MPSC 3d 105.

MANUFACTURED HOUSING

I. IN GENERAL

- §1. Generally**
- §2. Obligation of the manufacturers and dealers**
- §3. Jurisdiction and powers of Federal authorities**
- §4. Jurisdiction and powers of the State Commission**
- §5. Reports, records and statements**

II. WHEN A PERMIT IS REQUIRED

- §6. When a permit is required generally**
- §7. Operations and construction**

III. GRANT OR REFUSAL OF A PERMIT

- §8. Grant or refusal generally**
- §9. Restrictions or conditions**
- §10. Who may possess**
- §11. Public safety**

IV. OPERATION, TRANSFER, REVOCATION OR CANCELLATION

- §12. Operations under the permit generally**
 - §13. Duration of the permit**
 - §14. Modification and amendment of the permit generally**
 - §15. Transfer, mortgage or lease generally**
 - §16. Revocation, cancellation and forfeiture generally**
 - §17. Acts or omissions justifying revocation or forfeiture**
 - §18. Necessity of action by the Commission**
 - §19. Penalties**
-

MANUFACTURED HOUSING

No headnotes in this volume involved the question of manufactured housing.

PUBLIC UTILITIES

I. IN GENERAL

- §1. Generally
- §2. Nature of
- §3. Functions and powers
- §4. Termination of status
- §5. Obligation of the utility

II. JURISDICTION AND POWERS

- §6. Jurisdiction and powers generally
- §7. Jurisdiction and powers of the State Commission
- §8. Jurisdiction and powers of the Federal Commissions
- §9. Jurisdiction and powers of local authorities

III. FACTORS AFFECTING PUBLIC UTILITY CHARACTER

- §10. Tests in general
- §11. Franchises
- §12. Charters
- §13. Acquisition of public utility property
- §14. Compensation or profit
- §15. Eminent domain
- §16. Property sold or leased to a public utility
- §17. Restrictions on service, extent of use
- §18. Size of business
- §19. Solicitation of business
- §20. Submission to regulation
- §21. Sale of surplus
- §22. Use of streets or public places

IV. PARTICULAR ORGANIZATIONS-PUBLIC UTILITY CHARACTER

- §23. Particular organizations generally
- §24. Municipal plants

RATES

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- §25. Municipal districts**
 - §26. Mutual companies; cooperatives**
 - §27. Corporations**
 - §28. Foreign corporations or companies**
 - §29. Unincorporated companies**
 - §30. State or federally owned or operated utility**
 - §31. Trustees**
-

PUBLIC UTILITIES

I. IN GENERAL

- §1. Generally**
The Commission assessed a total of \$16,249,374 to Missouri's public utilities for payment of the Commission's anticipated operating expenses for fiscal year 2008. – Assessment FY 2008 16 MPSC 3d 80.
 - §5. Obligation of the utility**
The Commission assessed a total of \$16,249,374 to Missouri's public utilities for payment of the Commission's anticipated operating expenses for fiscal year 2008. – Assessment FY 2008 16 MPSC 3d 80.
-

RATES

I. JURISDICTION AND POWERS

- §1. Jurisdiction and powers generally**
- §2. Jurisdiction and powers of Federal Commissions**
- §3. Jurisdiction and powers of the State Commission**
- §4. Jurisdiction and powers of the courts**
- §5. Jurisdiction and powers of local authorities**
- §6. Limitations on jurisdiction and power**
- §7. Obligation of the utility**

II. REASONABLENESS-FACTORS AFFECTING REASONABLENESS

- §8. Reasonableness generally**
- §9. Right of utility to accept less than a reasonable rate**
- §10. Ability to pay**
- §11. Breach of contract**
- §12. Capitalization and security prices**
- §13. Character of the service**

RATES

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- §14. Temporary or emergency
- §15. Classification of customers
- §16. Comparisons
- §17. Competition
- §18. Consolidation or sale
- §19. Contract or franchise rate
- §20. Costs and expenses
- §21. Discrimination, partiality, or unfairness
- §22. Economic conditions
- §23. Efficiency of operation and management
- §24. Exemptions
- §25. Former rates; extent of change
- §26. Future prospects
- §27. Intercompany relations
- §28. Large consumption
- §29. Liability of utility
- §30. Location
- §31. Maintenance of service
- §32. Ownership of facilities
- §33. Losses or profits
- §34. Effects on patronage and use of the service
- §35. Patron's profit from use of service
- §36. Public or industrial use
- §37. Refund and/or reduction
- §38. Reliance on rates by patrons
- §39. Restriction of service
- §40. Revenues
- §41. Return
- §42. Seasonal or irregular use
- §43. Substitute service
- §44. Taxes
- §45. Uniformity
- §46. Value of service
- §47. Value of cost of the property
- §48. Violation of law or orders
- §49. Voluntary rates
- §50. What the traffic will bear
- §51. Wishes of the utility or patrons

III. CONTRACTS AND FRANCHISES

- §52. Contracts and franchises generally
- §53. Validity of rate contract
- §54. Filing and Commission approval
- §55. Changing or terminating-contract rates
- §56. Franchise or public contract rates

RATES

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- §57. Rates after expiration of franchise
- §58. Effect of filing new rates
- §59. Changes by action of the Commission
- §60. Changes or termination of franchise or public contract rate
- §61. Restoration after change

IV. SCHEDULES, FORMALITIES AND PROCEDURE RELATING TO

- §62. Initiation of rates and rate changes
- §63. Proper rates when existing rates are declared illegal
- §64. Reduction of rates
- §65. Refunds
- §66. Filing of schedules reports and records
- §67. Publication and notice
- §68. Establishment of rate base
- §69. Approval or rejection by the Commission
- §70. Legality pending Commission action
- §71. Suspension
- §72. Effective date
- §73. Period for which effective
- §74. Retroactive rates
- §75. Deviation from schedules
- §76. Form and contents
- §77. Billing methods and practices
- §78. Optional rate schedules
- §79. Test or trial rates

V. KINDS AND FORMS OF RATES AND CHARGES

- §80. Kinds and forms of rates and charges in general
- §81. Surcharges
- §82. Uniformity of structure
- §83. Cost elements involved
- §84. Load, diversity and other factors
- §85. Flat rates and charges
- §86. Mileage charges
- §87. Zone rates
- §88. Transition from flat to meter
- §89. Straight, block or step-generally
- §90. Contract or franchise requirement
- §91. Two-part rate combinations
- §92. Charter, contract, statutory, or franchise restrictions
- §93. Demand charge
- §94. Initial charge
- §95. Meter rental
- §96. Minimum bill or charge

RATES

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- §97. Maximum charge or rate**
- §98. Wholesale rates**
- §99. Charge when service not used; discontinuance**
- §100. Variable rates based on costs-generally**
- §101. Fuel clauses**
- §102. Installation, connection and disconnection charges**
- §103. Charges to short time users**

VI. RATES AND CHARGES OF PARTICULAR UTILITIES

- §104. Electric and power**
- §105. Demand, load and related factors**
- §106. Special charges; amount and computation**
- §107. Kinds and classes of service**
- §108. Gas**
- §109. Heating**
- §110. Telecommunications**
- §111. Water**
- §112. Sewers**
- §113. Joint Municipal Utility Commissions**

VII. EMERGENCY AND TEMPORARY RATES

- §114. Emergency and temporary rates generally**
- §115. What constitutes an emergency**
- §116. Prices**
- §117. Burden of proof to show emergencies**

VIII. RATE DESIGN, CLASS COST OF SERVICE

- §118. Method of allocating costs**
- §119. Rate design, class cost of service for electric utilities**
- §120. Rate design, class cost of service for gas utilities**
- §121. Rate design, class cost of service for water utilities**
- §122. Rate design, class cost of service for sewer utilities**
- §123. Rate design, class cost of service for telecommunications utilities**
- §124. Rate design, class cost of service for heating utilities**

RATES

I. JURISDICTION AND POWERS

- §1. Jurisdiction and powers generally**
The Commission's decision to move toward district-specific pricing and to apportion the rate increase as it did, is a lawful exercise of the Commission's

SECURITY ISSUES

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authority to make decisions based upon record evidence that comport with public policy goals perceived by the Commission to be just and reasonable at the time.
– Missouri-American Water Company 16 MPSC 3d 518.

V. KINDS AND FORMS OF RATES AND CHARGES

§81. Surcharges

The Commission ordered that the Relay Missouri surcharge was to be continued at the current rate of \$0.13 and that the amount that could be retained by the local exchange companies would also be continued at the rate of one percent or \$30 whichever is greater. - Relay Missouri 16 MPSC 3d 1.

VI. RATES AND CHARGES OF PARTICULAR UTILITIES

§110. Telecommunications

The Commission ordered that the Relay Missouri surcharge was to be continued at the current rate of \$0.13 and that the amount that could be retained by the local exchange companies would also be continued at the rate of one percent or \$30 whichever is greater. - Relay Missouri 16 MPSC 3d 1.

SECURITY ISSUES

I. IN GENERAL

- §1. Generally
- §2. Obligation of the utility
- §3. Authorization by a corporation
- §4. Conversion, redemption and purchase by a corporation
- §5. Decrease of capitalization
- §6. Sinking funds
- §7. Dividends
- §8. Revocation and suspension of Commission authorization
- §9. Fees and expenses
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- §14. Jurisdiction and powers of the State Commission
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SERVICE

I. IN GENERAL

§ 1. Generally

Upon learning that a utility may soon be unwilling or unable to provide safe and adequate service, the Staff of the Commission may ask the Commission for authority to petition the circuit court for an order attaching the utility's assets, as well as for authority to petition the circuit court for an order placing the utility under the control of a receiver. – Rouge Creek Utilities, Inc. 16 MPSC 3d 121.

V. SERVICE BY PARTICULAR UTILITIES

§43. Water

Upon learning that a utility may soon be unwilling or unable to provide safe and adequate service, the Staff of the Commission may ask the Commission for authority to petition the circuit court for an order attaching the utility's assets, as well as for authority to petition the circuit court for an order placing the utility under the control of a receiver. – Rouge Creek Utilities, Inc. 16 MPSC 3d 121.

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I. IN GENERAL

- §1. Generally
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II. JURISDICTION AND POWERS

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 - §18. Depreciation
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 - §21. Accounting
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 - §26. Financing practices
 - §27. Security issues
 - §28. Rules and regulations
 - §29. Billing practices
 - §30. Eminent domain
 - §31. Accounting Authority orders
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SEWER**I. IN GENERAL****§2. Certificate of Convenience and Necessity**

The Commission ordered that Aqua Missouri, Inc. connect ten additional houses to the sewer system at the Lake Carmel subdivision, in view of the fact that, Aqua Missouri holds a certificate of convenience and necessity to provide sewer service in the Lake Carmel area. – Becker v. Aqua Missouri, Inc. 16 MPSC 3d 144.

§3. Obligation of the Utility

The Commission ordered that Aqua Missouri, Inc. connect ten additional houses to the sewer system at the Lake Carmel subdivision, in view of the fact that, Aqua Missouri holds a certificate of convenience and necessity to provide sewer service in the Lake Carmel area. – Becker v. Aqua Missouri, Inc. 16 MPSC 3d 144.

II. JURISDICTION AND POWERS**§5. Jurisdiction and Powers**

A real estate developer and a non-profit homeowner's association that does not devote its sewer service to the public use indiscriminately to all members within its capabilities to serve is not a public utility, and is not subject to the Commission's jurisdiction. – Cathy Orler v. Folsom Ridge 16 MPSC 3d 28

III. OPERATIONS**§17. Service**

The reservation of a tap-on is not the provision of sewer service and does not involve a use, accommodation, product or commodity as referenced in Section 386.020(47) [currently 286.020(48)]. – Cathy Orler v. Folsom Ridge 16 MPSC 3d 28

STEAM**I. IN GENERAL****§1. Generally****§2. Obligation of the utility****§3. Certificate of convenience and necessity****§4. Transfer, lease and sale****§4.1. Change of suppliers****§5. Charters and franchise****§6. Territorial agreements**

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- §9. Jurisdiction and powers of the State Commission
- §10. Jurisdiction and powers of the local authorities
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- §13. Operations generally
- §14. Rules and regulations
- §15. Cooperatives
- §16. Public corporations
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- §31. Equipment
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- §36. Local service
- §37. Liability for damage
- §38. Financing practices
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- §46. Relations between connecting companies generally
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STEAM

No headnotes in this volume involved the question of steam.

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I. IN GENERAL

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- §2. Obligation of the utility
- §3. Certificate of convenience and necessity
 - §3.1. Certificate of local exchange service authority
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 - §3.3. Certificate of basic local exchange service authority
- §4. Transfer, lease and sale

II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers of local authorities
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III. OPERATIONS

- §8. Operations generally
- §9. Public corporations
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- §13. Costs and expenses
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- §14. Rates
 - §14.1. Universal Service Fund
- §15. Establishment of a rate base
- §16. Revenue

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- §17. Valuation
- §18. Accounting
- §19. Financing practices
- §20. Return
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- §36. Relations between connecting companies generally
- §37. Physical connection
- §38. Contracts
- §39. Division of revenue, expenses, etc.

V. ALTERNATIVE REGULATION AND COMPETITION

- §40. Classification of company or service as noncompetitive, transitionally, or competitive
- §41. Incentive regulation plans
- §42. Rate bands
- §43. Waiver of statutes and rules
- §44. Network modernization
- §45. Local exchange competition
- §46. Interconnection Agreements
- §46.1 Interconnection Agreements-Arbitrated
- §47. Price Cap

TELECOMMUNICATIONS

I. IN GENERAL

- §1. Generally

TELECOMMUNICATIONS

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The Commission ordered that the Relay Missouri surcharge was to be continued at the current rate of \$0.13 and that the amount that could be retained by the local exchange companies would also be continued at the rate of one percent or \$30 whichever is greater. - Relay Missouri 16 MPSC 3d 1.

The Commission denied VCI Company the designation as an eligible telecommunications carrier to receive federal universal service fund support for all of the exchanges serviced by Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri. The Commission stated three reasons for denying the designation: (1) VCI's local usage plan was not comparable to the ILEC's plan; (2) VCI did not demonstrate an adequate commitment to provide the USF supported services to customers in Missouri; and, (3) granting VCI ETC designation was not demonstrated to be in the public interest. - VCI Company 16 MPSC 3d 191.

The Commission ordered that the Application for Waiver of compliance with requirements of 4 CSR 240-32.080(5)(A)(1) related to time standards for installation of service filed by MCC Telephony of Missouri, Inc., on April 25, 2006 was denied. The Commission found that MCC Telephony had not demonstrated good cause for the Commission to grant it variance from the requirements of 4 CSR 240-32.080(5)(A). - MCC Telephony of Missouri, Inc. 16 MPSC 3d 235.

The Commission began authorizing video service pursuant to Section 67.2679.7 RSMo 2000 (Cum. Supp. 2007). This order was the first issued by the Commission authorizing CenturyTel to provide video service for the City of Columbia, Missouri. - CenturyTel Broadband Services, LLC 16 MPSC 3d 358.

The Commission rejected tariff sheets submitted on January 19, 2007, by CenturyTel of Missouri, LLC and Spectra Communications Group, LLC, d/b/a CenturyTel. The Commission further ordered that CenturyTel of Missouri, LLC and Spectra Communications Group, LLC are to fulfill all pending retail and resale orders for remote call forwarding service for Socket Internet and Socket Telecom, LLC. - CenturyTel of Missouri, LLC and Spectra Communications Group, LLC 16 MPSC 3d 531.

§3.1. Certificate of local exchange service authority

The Commission concluded that Comcast IP Phone, a fixed VoIP service, is a "Telecommunications Company" and "Public Utility" which is subject to regulation by the Commission. The Commission has ordered that Comcast IP Phone either cease providing Comcast Voice by December 10, 2007 or apply for an appropriate certificate of service authority to provide that service. - Staff v. Comcast IP Phone, LLC 16 MPSC 3d 496.

§3.2. Certificate of interexchange service authority

The Commission concluded that Comcast IP Phone, a fixed VoIP service, is a "Telecommunications Company" and "Public Utility" which is subject to regulation by the Commission. The Commission has ordered that Comcast IP Phone either cease providing Comcast Voice by December 10, 2007 or apply for an appropriate certificate of service authority to provide that service. - Staff v. Comcast IP Phone, LLC 16 MPSC 3d 496.

§3.3. Certificate of basic local exchange service authority

The Commission concluded that Comcast IP Phone, a fixed VoIP service, is a "Telecommunications Company" and "Public Utility" which is subject to regulation by the Commission. The Commission has ordered that Comcast IP Phone either cease providing Comcast Voice by December 10, 2007 or apply for an appropriate certificate of service authority to provide that service. – Staff v. Comcast IP Phone, LLC 16 MPSC 3d 496.

III. OPERATIONS**§19. Financing practices**

The Commission ordered that the application filed by Kingdom Telephone Company on November 2, 2007 be approved. This application allowed Kingdom Telephone Company to borrow up to \$5 million from the CoBank, ACB and furthermore authorizes Kingdom Telephone Company to execute and deliver promissory notes in order to complete the transactions. – Kingdom Telephone Company 16 MPSC 3d 632.

IV. RELATIONS BETWEEN CONNECTING COMPANIES**§36. Relations between connecting companies generally**

The Commission ordered that BPS Telephone Company shall not assert an exemption under 47 U.S.C. 251(f) with respect to a request for an interconnection agreement by Big River Telephone Company, LLC and also, the Order would not preclude BPS Telephone Company from asserting an exemption under the aforementioned statute with respect to any other telecommunications company's request for an interconnection agreement. – Big River Telephone Company, LLC 16 MPSC 3d 287

V. ALTERNATIVE REGULATION AND COMPETITION**§40. Classification of company or service as noncompetitive, transitionally, or competitive**

The Commission ordered that Spectra Communications Group, LLC d/b/a CenturyTel's residential services, other than exchange services be classified as competitive. The Commission determined that there was undisputed evidence that there was at least, one non-affiliated wireless carrier and at least one non-affiliated wireline carrier, which provided basic local telecommunications service in the Brunswick, Cameron, Golden, City, Greenfield Lawson and Sarcoux exchanges. – Spectra Communications Group, LLC, d/b/a CenturyTel 16 MPSC 3d 8.

The Commission ordered that CenturyTel of Missouri, LLC's business services, other than exchange services, be classified as competitive. The Commission determined that there was undisputed evidence that there was at least, one non-affiliated wireless carrier and at least one non-affiliated entity providing local voice service carrier, which provided basic local telecommunications service in the Branson, Ozark and Troy exchanges related to business services. – CenturyTel of Missouri, LLC 16 MPSC 3d 17.

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The Commission ordered CenturyTel of Missouri, LLC's residential services, other than exchange services, be classified as competitive. The Commission determined that there was undisputed evidence that there was at least, one non-affiliated wireless carrier and at least one non-affiliated entity providing local voice service carrier, which provided basic local telecommunications service in Bourbon, Cabool, Cassville, Cuba, Forsyth, Kimberling City, and Mansfield exchanges. – CenturyTel of Missouri, LLC 16 MPSC 3d 17.

The Commission ordered that each of Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri's exchanges in which competitive classification was granted in Commission Case Nos. TO-2006-0093 and TO-2006-0102 shall continue to be designated as competitive. – Southwestern Bell Telephone, L.P 16 MPSC 3d 124.

The Commission ordered that Embarq Missouri, Inc.'s, residential services, other than exchange access service, would be classified as competitive in the Lebanon exchange. – Embarq Missouri, Inc. 16 MPSC 3d 262.

The Commission grants Embarq Missouri's request for competitive classification pursuant to Section 392.245.5 RSMo (Cum. Supp. 2006), other than exchange access service, for residential services in Ft. Lenard Wood, St. Robert, and Waynesville exchanges. The Commission also grants competitive classification for business services in the Warrensburg exchange. The Commission approves the tariff revision to implement the classifications. – Embarq Missouri, Inc. 16 MPSC 3d 509.

The Commission found that competition continues to exist in exchanges belonging to Embarq of Missouri, Inc., d/b/a Embarq that the Commission had previously classified as competitive. Furthermore, the Stipulation and Agreement filed by Embarq of Missouri, Inc., d/b/a Embarq; the Staff of the Commission; and the Office of the Public Counsel is approved. – Embarq Missouri, Inc. 16 MPSC 3d 641.

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- §2. Constitutional limitations
- §3. Necessity for
- §4. Obligation of the utility

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- §8. Jurisdiction and powers of local authorities

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- §13. Ascertainment of value generally
- §14. For rate making purposes
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- §19. Appreciation
- §20. Apportionment of investment or costs
- §21. Experimental or testing cost
- §22. Financing costs
- §23. Intercorporate relationships
- §24. Organization and promotion costs
- §25. Discounts on securities
- §26. Property not used or useful
- §27. Overheads in general
- §28. Direct labor
- §29. Material overheads
- §30. Accidents and damages
- §31. Engineering and superintendence
- §32. Preliminary and design
- §33. Interest during construction
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- §45. Materials and supplies
- §46. Second-hand property
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- §50. Contracts
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- §52. Franchises
- §53. Leases and leaseholds
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- §55. Rights of way and easements
- §56. Water rights

VIII. WORKING CAPITAL

- §57. Working capital generally
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- §59. Factors affecting allowance
- §60. Billing and payment for service
- §61. Cash on hand
- §62. Customers' deposit
- §63. Expenses or revenues
- §64. Prepaid expenses
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- §66. Amount to be allowed
- §67. Property not used or useful

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- §69. Necessity of deduction for depreciation
- §70. Factors affecting propriety thereof
- §71. Methods of establishing rates or amounts
- §72. Property subject to depreciation
- §73. Deduction or addition of funds or reserve

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X. VALUATION OF PARTICULAR UTILITIES

- §74. Electric and power**
 - §75. Gas**
 - §76. Heating**
 - §77. Telecommunications**
 - §78. Water**
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-

VALUATION

No headnotes in this volume involved the question of valuation.

WATER

I. IN GENERAL

- §1. Generally**
- §2. Certificate of convenience and necessity**
- §3. Obligation of the utility**
- §4. Transfer, lease and sale**
- §5. Joint Municipal Utility Commissions**

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- §6. Jurisdiction and powers generally**
- §7. Jurisdiction and powers of the Federal Commissions**
- §8. Jurisdiction and powers of the State Commission**
- §9. Jurisdiction and powers of local authorities**
- §10. Receivership**
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III. OPERATIONS

- §12. Operation generally**
- §13. Construction and equipment**
- §14. Maintenance**
- §15. Additions and betterments**
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- §17. Return**
- §18. Costs and expenses**

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- §19. Service**
 - §20. Depreciation**
 - §21. Discrimination**
 - §22. Apportionment**
 - §23. Accounting**
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 - §26. Abandonment or discontinuance**
 - §27. Reports, records and statements**
 - §28. Financing practices**
 - §29. Security issues**
 - §30. Rules and regulations**
 - §31. Billing practices**
 - §32. Accounting Authority orders**
-

WATER

I. IN GENERAL

§1. Generally

The Commission approves an unopposed non-unanimous stipulation and agreement between Missouri-American Water Company, City of Jefferson City, Missouri, the Staff of the Missouri Public Service Commission and the Office of the Public Counsel regarding infrastructure and service improvements. – Missouri-American Water Company 16 MPSC 3d 361.

The Commission approves an unopposed non-unanimous stipulation and agreement between Missouri-American Water Company and Metropolitan St. Louis Sewer District regarding rate design. – Missouri-American Water Company 16 MPSC 3d 367.

The cost allocation resulting from the compromises in the Global Agreement were reasonable. Joplin's position against the effect of the Agreement lacked support. Thus the Commission adopted the Agreement. – Missouri-American Water Company 16 MPSC 3d 386.

The Commission accepted Staff's payroll and payroll tax annualization. The Staff calculated annualization values appropriately and Joplin failed to demonstrate how the values were miscalculated. – Missouri-American Water Company 16 MPSC 3d 386.

The Commission struck the answer of Universal Utilities, Inc., and Nancy Croasdell for failure to comply with the Commission's order granting staff's motion to compel discovery and entered default judgment. – Staff v. Universal Utilities, Inc. 16 MPSC 3d 622.

§3. Obligation of the utility

The Commission ordered that no later than November 1, 2007, Suburban Water and Sewer Company will prepare and distribute a brochure detailing the rights and responsibilities of the utility and its customers that is acceptable to Staff. – Staff v. Suburban Water and Sewer Company 16 MPSC 3d 334.

II. JURISDICTION AND POWERS

§6. Jurisdiction and powers generally

A real estate developer and a non-profit homeowner's association that does not devote its water service to the public use indiscriminately to all members within its capabilities to serve is not a public utility, and is not subject to the Commission's jurisdiction. – Cathy Orlor v. Folsom Ridge 16 MPSC 3d 28.

The Commission has the legal authority to accept stipulations and agreements as offered by the parties pursuant to Section 536.060, RSMo 2000. See also Commission Rule 4 CSR 240-2.115. - Missouri-American Water Company 16 MPSC 3d 361.

The Commission has the legal authority to accept stipulations and agreements as offered by the parties pursuant to Section 536.060, RSMo 2000. See also Commission Rule 4 CSR 240-2.115. – Missouri-American Water Company 16 MPSC 3d 367.

§10. Receivership

Upon learning that a utility may soon be unwilling or unable to provide safe and adequate service, the Staff of the Commission may ask the Commission for authority to petition the circuit court for an order attaching the utility's assets, as well as for authority to petition the circuit court for an order placing the utility under the control of a receiver. – Rogue Creek Utilities, Inc. 16 MPSC 3d 121.

III. OPERATIONS

§15. Additions and betterments

Agreement regarding infrastructure improvements, specifically back-up power generation, water storage, and small main replacement, resolved by party agreement without Commission endorsement of any parties' position. – Missouri-American Water Company 16 MPSC 3d 361.

§16. Rates and Revenues

Under the terms of the stipulation and agreement, MAWC will provide water usage and meter reading data and customer billing information and related services to MSD for which MSD will pay MAWC \$29,166 per month (\$350,000 annually). The rate of compensation will be incorporated into a revised tariff sheet, number RT 16, and loss of revenue associated with this change from the existing rate paid by MSD will be reflected in the revenue requirement to be ordered by the Commission in this case. The Commission approved the agreement without endorsement of any parties' position. – Missouri-American Water Company 16 MPSC 3d 367.

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The Commission determined that a single tariffed rate be retained, but a surcharge be added to the St. Joseph District's rates to ameliorate the effect of the large capital expenditures in the St. Joseph District on the other districts. – Missouri-American Water Company 16 MPSC 3d 518.

§19. Service

The reservation of a tap-on is not the provision of water service and does not involve a use, accommodation, product or commodity as referenced in Section 386.020(47) [currently 286.020(48)]. – Cathy Orlor v. Folsom Ridge 16 MPSC 3d 28.

Commission-approved agreement regarding infrastructure improvements, specifically back-up power generation, water storage, and small main replacement, designed to improve service to keep up with customer demand. - Missouri-American Water Company 16 MPSC 3d 361.

§29. Security Issues

Commission-approved agreement regarding infrastructure improvements, specifically back-up power generation, water storage, and small main replacement, designed to improve reliability of distribution, i.e. pressure and volume of water, for city fire suppression. - Missouri-American Water Company 16 MPSC 3d 361.
